

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO,
O.L. McCOTTER, SECRETARY OF CORRECTIONS, and
ROBERT J. TANSY, WARDEN OF THE
PENITENTIARY OF NEW MEXICO,
Petitioners,

v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
and ALL OTHERS SIMILARLY SITUATED

APPENDIX TO
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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APPENDIX A

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

No. 88-1442

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS, and
all others similarly situated,
Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, GOVERNOR OF THE STATE OF NEW
MEXICO, O.L. McCOTTER, SECRETARY OF CORRECTIONS,
and ROBERT J. TANSY, WARDEN OF THE PENITENTIARY
OF NEW MEXICO,

Defendants-Appellants.

and

MOUNTAIN STATES LEGAL FOUNDATION, Amici Curiae, on
behalf of its members, the State of Kansas, and the
State of Utah.

and

Amici Curiae of the STATES OF HAWAII, OREGON, UTAH,
WASHINGTON, and WYOMING, in support of Appellants.

Appeal from the United States District Court
For the District of New Mexico
(D.C. Civil No. 77-0721-JB)

[Filed Sept. 15, 1989]

Joel I. Klein of Onek, Klein & Farr, Washington, D.C. (Hal Stratton, Attorney General, Henry M. Bohnhoff, Deputy Attorney General, James Bieg, Assistant Attorney General, Santa Fe, New Mexico; Norman S. Thayer, Saul Cohen, and Stephany S. Wilson of Sutin, Thayer & Browne, Albuquerque, New Mexico; and Paul M. Smith of Onek, Klein & Farr, Washington, D.C., with him on the brief), for Defendants-Appellants.

Elizabeth Alexander, Washington, D.C. (Mark J. Lopez and Alvin J. Bronstein, National Prison Project of the ACLUF, Inc., Washington, D.C.; Ray Twohig, P.C., Albuquerque, New Mexico; and Mark H. Donatelli of Rothstein, Bailey, Bennett, Daly & Donatelli, Santa Fe, New Mexico, with her on the brief), for Plaintiffs-Appellees.

Paul Farley, Mountain States Legal Foundation, Denver, Colorado; Robert T. Stephan, Attorney General, State of Kansas, Topeka, Kansas; and David L. Wilkinson, Attorney General, State of Utah, Salt Lake City, Utah, Attorneys for the Amici Curiae, on behalf of the Mountain States Legal Foundation, its members, the State of Kansas, and the State of Utah.)

(Warren Price, III, Attorney General, State of Hawaii, and Steven S. Michaels, Deputy Attorney General, Honolulu, Hawaii; Dave Frohnmayer, Attorney General, State of Oregon; David L. Wilkinson, Attorney General, State of Utah; Kenneth O. Eikenberry, Attorney General, State of Washington; and Joseph B. Meyer, Attorney General, State of Wyoming, Attorneys for the Amici Curiae States of Hawaii, Oregon, Utah, Washington, and Wyoming.)

Before SEYMOUR, EBEL, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

This appeal is from an order of the United States District Court for the District of New Mexico denying the defendants' motion to vacate certain parts of a consent decree.¹ Our study of the matter convinces us that the district court did not err in denying defendants' motion to vacate. Accordingly, we affirm.

By a first amended complaint filed July 6, 1978, Dwight Duran, and others, all inmates of the Penitentiary of New Mexico ("PNM"), instituted a class action charging that conditions in the penitentiary violated rights guaranteed them by the United States Constitution and by federal statutes.² Jurisdiction was based on 28 U.S.C. § 1331. Named as defendants were the following:

1. Hon. Jerry Apodaca, Governor of the State of New Mexico;
2. Charles Becknell, Secretary of Criminal Justice for the State of New Mexico;³
3. Edwin Mahr, Director of the Corrections Division for the State of New Mexico;
4. Levi Romero, Warden of the Penitentiary of New Mexico;

¹ The district court's Memorandum Opinion and Order was published and appears as Duran v. Carruthers, 678 F. Supp., 839 (D.N.M. 1988). The background chronology is fully set forth therein and will not be repeated in great detail here.

² The first amended complaint also set forth in a second and third claim violations of the New Mexico state constitution, and New Mexico state statute. A fourth claim for relief alleged violations of the United States Law Enforcement Assistant Administration, 49 U.S.C. § 3750(b). However, none of these claims plays any role in the present proceeding.

³ The Secretary of Criminal Justice is appointed by the Governor.

5. Robert Montoya, a Deputy Warden of the Penitentiary of New Mexico; and
6. Joseph Lujan, a Deputy Warden of the Penitentiary of New Mexico.⁴

Partial consent agreements, covering visitation, access to legal services, and food services, were signed by the parties in 1979, and orders reflecting the agreements were entered by the court. Those partial consent decrees are not the subject of this appeal. In February, 1980, a bloody riot occurred in the Penitentiary of New Mexico in which twelve correctional officers were taken hostage, thirty-three inmates were killed, at least ninety were seriously injured, and damage to the prison facilities measured in the millions of dollars.

In this general setting the parties entered into a consent decree which was approved by the district court on July 14, 1980. This negotiated decree was elaborate, extending well over 100 printed pages, and by its provisions regulated many aspects of the prison operation. In provisions not challenged in the present proceeding, the decree comprehensively regulates the defendants' conduct in the penitentiary in the area of (1) food services, (2) physical facilities, including clothing and personal hygiene items provided to inmates, (3) medical care, (4) mental health care, (5) correspondence between inmates and outsiders, (6) access to legal resources, and (7) attorney-client visitations.

On June 12, 1987, the Attorney General for the State of New Mexico filed a motion to vacate seven parts of the 1980 consent decree.⁵ The motion was filed on behalf of the Hon. Garrey Carruthers, who was then the Gov-

⁴ All defendants were represented in the district court by the Attorney General for New Mexico.

⁵ An earlier motion to vacate the 1980 consent decree in its entirety was withdrawn.

ernor of New Mexico, and on behalf of the other individuals named as defendants in the amended complaint, or their successors. The motion to vacate was signed not only by the state's Attorney General, but also by private counsel located in Albuquerque, New Mexico and Washington, D.C.

Specifically, the defendants moved to vacate the following portions of the 1980 consent decree:

1. Paragraph 6 in the July 14, 1980 Agreement, except for the first sentence.*
2. Paragraphs 1 through 15 in the "Classification" section of the consent decree.
3. Paragraphs 1 through 10, except for the first sentence of paragraph 7 and the second sentence of paragraph 10 and paragraph 11(f) in the "Maximum Security" section of the decree.

* 6. Other than in times of emergency, changed circumstances may, in the future, justify some changes in this agreement and the policies attached hereto and the partial consent decrees on file herein. No change or changes may be made which will lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein. Notice will be given to the lawyers for the Plaintiffs at least thirty (30) days prior to the proposed implementation date. Said notice will contain the proposed change or changes and the reasons therefore. Counsel for the Plaintiffs will ascertain whether, in their opinion, the proposed change or changes in any way lessen the benefits provided by this agreement or the policies attached hereto and the partial consent decrees on file herein. If so, they will notify Defendants of their objections and the reasons therefore within fifteen (15) days. Efforts will be made to informally resolve the matter. If the dispute cannot be resolved, it will be submitted to the court. The burden will then be on the Defendants to justify that the change or changes should be made and will not lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein before the change or changes will be allowed.

4. Paragraphs 1 through 11 and 14 through 18 of the "Inmate Discipline" section of the decree.

5. Paragraphs 1 through 7, 9 through 12, 14 through 18 and the prologue of the "Inmate Activity" section of the decree.

6. Paragraphs 1, 2, 4(A) and 4(M), except as they apply to inmates housed in the PNM-Main, or facilities operated for specialized mental-health care, maximum security or disciplinary segregation, paragraph 8, as it applies to provision of cigarettes and tobacco, and paragraph 11 as such appears in the "Living Conditions" section of the decree.

7. Paragraphs 1 through 10, 11(E), 13 through 15, plus the probable cause provision in paragraph 11(D) and the probable cause and reasonable suspicion requirements in paragraph 12 in the "Visitation" section of the decree.⁷

Defendants' basic position is that the portions of the consent decree which they seek to vacate are not directly related to federally created rights nor do they tend to vindicate federal rights. Rather, the defendants argue that at best they may relate to, and vindicate, rights created by the State of New Mexico, and that some others relate only to better penological practices. Such remedies, according to the defendants, are beyond the reach of a federal district court, and should therefore

⁷ In greater detail, the contested provisions (1) requires appellants to follow specified procedures and criteria in classifying inmates to different security levels, and severely restricts both the amount of time and the circumstances in which they may use the "maximum security" classification; (2) sets out the exclusive list of actions that may form the basis for inmate discipline, as well as the maximum penalties; (3) mandates that eight hours of vocational or educational activity per day be made available to each inmate; (4) prohibits, in all prisons and under all circumstances, the housing of two inmates in the same cell; and (5) comprehensively regulates the prison policies on visitations, including the types of searches that may be made in relation to such visits.

be removed from the consent decree. In this argument, defendants place considerable reliance on *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), where the Supreme Court held that the Eleventh Amendment prohibited a federal district court from ordering state officials to conform their conduct to state law.

At the outset it should be remembered that in the instant case there was no trial. We have a first amended complaint filed July 6, 1978, followed by several partial consent decrees in 1979, culminating in an elaborate and all-encompassing final consent decree on July 14, 1980. Consequently, the first amended complaint should be our starting point.

In a "preliminary statement" to the first amended complaint the plaintiffs contend that "the totality of the overcrowding and other conditions at PNM fall beneath standards of human decency, inflict needless suffering on prisoners and create an environment which threatens prisoners' mental and physical well-being and results in physical and mental deterioration and dehabilitation of the prisoners confined therein, which is both unnecessary and penologically unjustifiable." By further prefatory statement, the plaintiffs asked the district court, after hearing, to declare that the totality of prison conditions are unconstitutional under the Constitutions of the United States and New Mexico and in violation of the statutes of the United States and New Mexico.

The plaintiffs' first claim for relief was filed under 42 U.S.C. § 1983 to redress injuries suffered by the plaintiffs, and the class they sought to represent, for deprivation by the defendants of rights secured the plaintiffs by the first, sixth, eighth, ninth and fourteenth amendments to the United States Constitution. Specific constitutional rights allegedly violated by the defendant were the rights to be free from cruel and unusual punishment, to due process, to religious freedom, to free-

dom of expression and association, to have access to courts, to privacy, and to equal protection.

A second claim for relief was based on Article II, section 13 of the New Mexico Constitution prohibiting cruel and unusual punishment. It was also alleged in the second claim for relief that the conditions at the penitentiary violated plaintiffs' right to freedom of speech, religion, equal protection, due process, and other rights guaranteed by Article II, sections 11, 17, and 18 of the New Mexico Constitution.

In their third claim for relief, the plaintiffs alleged that the several defendants had failed to exercise their duties to operate the penitentiary in accord with Article II, section 4 of the New Mexico Constitution and N.M. Stat. Ann. §§ 42-1-38, 42-1-1.1, 42-1-31.2, 42-9-6(g), and 42-9-6(h).

The fourth claim for relief was based on provisions of the United States Law Enforcement Assistance Administration, 49 U.S.C. § 3750(b), with the plaintiffs claiming that they were third party beneficiaries under contractual arrangements between the Administration and the defendants.

Under the section heading "factual Allegations," the plaintiffs set forth in the first amended complaint the facts underlying all of their several claims for relief. Specifically, plaintiffs alleged that the penitentiary was "grossly and inhumanely overcrowded." According to the first amended complaint, some of the prisoners were forced to live in cells which were approximately 6' x 9' in size, with two or more persons being housed in one cell, and that the majority of the prisoners were housed in dormitories which were overcrowded, filthy and impossible to keep clean. Such overcrowding, plaintiffs alleged, destroyed any possibility of privacy and rendered the quarters unfit for human habitation because of mice, roaches, vermin, clogged toilets, and the like.

The plaintiffs also complained about food service, physical and sexual assaults by other prisoners, understaffed professional, educational and security personnel, improper classification of inmates according to their educational, vocational and health needs, lack of meaningful industrial or institutional employment, inadequate recreational activities, unduly restrictive visitation rights and correspondence policies, inadequate medical and dental care, lack of access to legal books and resources, and disciplinary proceedings that were devoid of due process.

Based upon the factual allegations, the plaintiffs sought class action certification, a declaratory judgment that the "totality of the conditions" at the penitentiary violated the rights of the plaintiffs established by the constitutions of the United States and of New Mexico and by both federal and local state statutes, and a preliminary and permanent injunction directing the defendants to comply with the various constitutional and statutory mandates. The plaintiffs also sought to require the defendants to pay the costs of the action, including attorneys' fees pursuant to 42 U.S.C. § 1988.

As above stated, the parties submitted several partial consent decrees to the district court in 1979, and orders were entered in accord with the matters agreed to by the parties. And on July 14, 1980, a final consent decree was entered by the court reflecting the agreements between the parties. These orders covered such items as correspondence policies and practices, attorney-prisoner visitations, food service, inmate legal access, visitation rights, classification of inmates, living conditions, inmate activity, medical care, mental health care, staffing and training of prison personnel, maximum security classification, and inmate discipline procedure.

A prefatory statement in the final consent decree stated that the agreement was voluntarily and mutually agreed upon as a compromise settlement of the dispute between

the parties. Another statement in the final agreement between the parties read as follows:

Those policy statements and the partial consent decrees on file herein may include specific requirements and procedures beyond what is required by the Constitution of the United States, the Constitution of the State of New Mexico, the federal Civil Rights Act, the New Mexico Torts Claim Act, or any other constitutional, statutory or common law requirement.

Article XI of the United States Constitution⁸ provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.

A literal reading of the eleventh amendment would appear to bar only suits against a state by a citizen of another state. However, it has been interpreted to also bar suits against a state brought by its own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). In the instant case, the plaintiffs are citizens of New Mexico, and the State of New Mexico, as such, is not named as a defendant. The defendants are, however, various state officials, and the immunity granted in the eleventh amendment to the state bars a suit against a state official when the suit is one which, in essence, would operate against the state. *Edelman v. Jordan*, 415 U.S. 651 (1974). However the eleventh amendment does not bar a suit in federal district court against a state official seeking injunctive relief where the state official has allegedly violated federal

⁸ The eleventh amendment was adopted in response to *Chisholm v. Georgia*, 2 U.S. 4A (1793) which allowed a suit by two South Carolinians, on behalf of a British subject, against the State of Georgia.

law. *Ex Parte Young*, 209 U.S. 123 (1908). The Eleventh Amendment does, however, prohibit a federal district court from granting injunctive relief against a state official who has allegedly violated only state law, as opposed to federal law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).

In the instant case, the plaintiffs instituted a suit against state officials alleging that they violated, *inter alia*, the federal constitution and federal statutes. Under *Ex Parte Young*, *supra*, the defendants under the eleventh amendment are not immune from such a suit. Counsel agrees that those parts of the consent decree setting forth rules and regulations for prison conduct which are directly related to federally protected rights, or tend to vindicate those rights, are proper, and are not here challenged. However, it is counsel's further position that those parts of the consent decrees which defendants seek to have vacated represent remedies that are *not* directly related to federally protected rights, nor do they tend to vindicate such rights. With the latter proposition, we disagree.

Arguably, the provisions which the defendants seek to vacate do relate to, or tend to vindicate, federally protected rights. In addition, the defendants, by the consent decrees, waived their right to make plaintiffs establish at trial that they were entitled to all the relief afforded them by the consent decrees. In this latter connection, the Supreme Court, in *Swift & Co. v. United States*, 276 U.S. 311, 329 (1928), commented as follows:

Here again, the defendants ignore the fact that by consenting to the entry of the decree, "without any findings of fact," they left to the Court the power to construe the pleadings, and in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, and to abstain from acquiring any interest hereafter.

The defendants' first request in their motion to vacate was that paragraph six in the 1980 consent decree be vacated, except for the first sentence thereof. *See* n. 3 *supra*. We regard paragraph six to concern procedure, rather than substance. It provides that no change which will lessen the benefits provided by the agreement and decree may be made, and then goes on to outline the procedure to be followed when the defendants proposed to "implement" the decree, namely, 30 days notice to plaintiffs prior to any implementation, granting plaintiffs 15 days to file any objection to a proposed change, requiring the parties to attempt to informally resolve any dispute, and providing for unresolved matters to be resolved by the district court after a hearing wherein the defendants have the burden of showing that the proposed change is just and will not lessen the benefits provided by the decree. These procedural safeguards for the plaintiffs, which the defendants in the consent decree saw fit to grant, attach to all the remedies provided in the decree, many of which defendants concede have a direct relationship to federal rights and which are not challenged in this case. Such being the case, the district court, in our view, did not err in refusing to vacate paragraph six, as requested by the defendants.

The other parts of the consent decree which the defendants seek to have vacated relate to classification of inmates, maximum security, inmate discipline, inmate activity, living conditions, and inmate visitation rights. As indicated, it was, and is, the plaintiffs' position that it was the "totality" of the prison conditions, not necessarily any one condition, which violated their federally protected rights. In our view, each of the matters which form the basis of this case is a part of that "totality" and does bear on, or tend to vindicate, federal rights. Further, by the 1980 agreement and the consent decree based thereon, the defendants waived their right to trial. Quite conceivably, if the case had gone to trial plaintiffs' evidence might well have established that the remedies

now complained about are indeed tied to federal rights, or at least tend to vindicate such rights.⁹ But the defendants voluntarily waived their right to insist that the plaintiffs prove their case in open court.

We reject the defendants' argument that the Eleventh Amendment dictates the granting of their motion to vacate. As indicated, counsel concedes that the district court had the jurisdiction and authority to grant relief to these plaintiffs against these defendants where prison conditions violated federal rights, be they constitutional or statutory. That concession wipes out much of the defendants' Eleventh Amendment argument.¹⁰ In Local

⁹ Such a "totality of the circumstances" approach was approved by the Supreme Court in *Hutto v. Finney*, 437 U.S. 678, 685-89 (1978).

¹⁰ Indeed, there is ample authority for finding that each of the contested sections vindicates a federal right. In *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), this court reaffirmed that there is a constitutional right to be reasonably protected from constant threats of violence and sexual assaults from other prisoners. More specifically, this court indicated that, although such a remedy was not warranted under the facts in *Ramos*, there may be a point where motility, classification, and idleness could constitute an actual violation of the eighth amendment. *Id.* at 566-67.

Similarly, the provisions regarding inmate visitation do not go beyond what could be ordered by a court. See *Pell v. Procunier*, 417 U.S. 817 (1974). Indeed, in 1984 the Department of Corrections' own analysis of the visitation provisions reached the conclusion that the decree did not go beyond those visitation rights that could be constitutionally imposed in its absence. Attachment A to Plaintiff's Supplemental Response to Defendant's Motion to Vacate or Modify the Judgment, filed 1/6/86.

All of the other contested provisions may be similarly justified. See *Rhodes v. Chapman*, 452 U.S. 337 (1981) (overcrowding may be a constitutional violation); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (court may impose prophylactic rules to prevent repetition of constitutional violations).

However, it must be noted that the contested provisions should not be viewed in isolation, but rather as part of the "totality of

No. 93 v. City of Cleveland, 478 U.S. 501 (1986), the Supreme Court in a Title VII case, where a consent decree was entered, spoke as follows:

Accordingly, a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the plaintiff . . . and must further the objectives of the law upon which the complaint was based. . . . However, in addition to the law which forms the basis for the claim, the parties' consent animates the legal force of a consent decree. . . ." Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial (citations omitted).

As stated, central to defendants' argument is *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). Such reliance is in our view misplaced. The Supreme Court in *Pennhurst* held that the Eleventh Amendment prohibited a federal district court from ordering state officials to conform their conduct to state law.¹¹ That is not our case. Here, the district court ordered state officials to conform their conduct to federal law, and the provisions of the decree which the defendants seek to vacate tend to vindicate those rights. And even if they didn't bear directly on federal rights, the provisions sought to be vacated come within the rule of *Local No. 93 v. City of Cleveland*, *supra*, i.e., (1) the consent decree springs from and serves to resolve a dispute within the

the circumstances" existing at PNM. *Hutto v. Finney*, 437 U.S. 678 (1978).

¹¹ In *Pennhurst*, judgment was entered after a "lengthy trial" and did not, as here, involve a consent decree.

district court's subject matter jurisdiction; (2) the consent decree comes within the "general scope" of the case made by plaintiffs in the first amended complaint; and (3) furthers the objectives upon which the complaint is based, in which event "the parties' consent animates the legal force of a consent decree" and a district court is not barred from entering a consent decree providing broader relief than the court might possibly have been empowered to enter after trial.

Kozlewski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), resembles our case. In that case state officials appealed from a consent decree which established procedures and sanctions governing the suspension and termination of prison visitation rights, arguing that the sanctions, unlike the procedures, in the decree were unrelated to the underlying due process violation, and that accordingly the Eleventh Amendment barred subject matter jurisdiction. A divided panel of the Second Circuit rejected that argument and spoke as follows:

Before entering a consent judgment, the district court must be certain that the decree 1) "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," 2) "come[s] within the general scope of the case made by the pleading," and 3) "further[s] the objectives of the law upon which the complaint was based. *Firefighters*, 478 U.S. at 525 (other citations omitted). These three conditions are sufficient even if the decree contains broader relief than the court could have awarded after trial.

Judgment affirmed.¹²

¹² The present appeal concerns only the propriety of the district court's order denying defendants' motion to vacate parts of the 1980 consent decree. We are not here concerned with defendants' right, if any, to have "equitable modification" of that decree.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

Civil No. 77-0721-JB

DWIGHT DURAN, *et al.*,
Plaintiffs,
v.

GARREY CARRUTHERS, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

[Entered Feb. 11, 1988]

The defendants in the above-captioned civil action have filed a motion seeking to vacate portions of the consent decree approved and entered by this Court in 1980.¹ As stated in their brief in support of the motion to vacate, “[d]efendants’ fundamental contention is that portions of the 1980 decree create rights that are not grounded in federal law and thus cannot be enforced by a federal court.” Defendants’ brief, p. 2. The defendants’ motion relies on the eleventh amendment, and related considera-

¹ The entire consent decree was approved and entered on July 14, 1980. Certain portions of the decree, relating to correspondence, public and attorney visitation, food service, legal access, and visiting, were submitted to the Court in 1979, and were approved at various times during that year.

tion of comity. The motion has been extensively briefed by the parties, and has been given prolonged and careful attention by the Court. Ultimately, as demonstrated in this Memorandum Opinion, the motion rests on the incorrect and unsupported conception of the nature of the eleventh amendment immunity, and a misapplication of the principle of comity. Although this memorandum may seem prosaic and somewhat pedantic, for which the Court apologizes, it is necessary in order to meet the extravagant contentions of defendants.

I. PLAINTIFFS' FIRST AMENDED COMPLAINT.

On July 6, 1978, the plaintiff class, through counsel, filed its first amended complaint. The complaint alleges that "the totality of the overcrowding and other conditions at PNM fall beneath standards of human decency, inflict needless suffering on prisoners and create an environment which threatens prisoners' mental and physical well-being, and results in the physical and mental deterioration and debilitation of the persons confined therein which is both unnecessary and penologically unjustifiable." First Amended Complaint, ¶ 1.² This general allegation is elaborated upon by extensive factual allegations dealing with a wide range of conditions and practices alleged to be in place at the Penitentiary of New Mexico. First Amended Complaint, ¶¶ 15-32.

Following this elaboration, the first amended complaint sets forth four claims for relief: first, a claim that the

² At the time the first amended complaint was filed, the class definition was limited to all prisoners who are or will be confined in the Penitentiary of New Mexico, the only prison in the state other than those confined in minimum security facilities, who are not part of the class. The Court's July 14, 1980, order approving the comprehensive consent decree expanded the class, "by agreement of the parties . . . to include all those inmates who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close, or medium security facility open for operation by the State of New Mexico after June 12, 1980."

totality of the conditions, alleged in the complaint, violates the federal constitutional rights of the plaintiff class secured by the first, fourth, fifth, sixth, eighth, ninth and fourteenth amendments of the United States Constitution; the second and third claims for relief are based on state constitutional and statutory law;³ the fourth claim for relief is predicated on the assertion that the plaintiff class is a third-party beneficiary of a contractual arrangement between the defendants and the United States Law Enforcement Assistance Administration, pursuant to 49 U.S.C. § 3750.

II. THE 1980 CONSENT DECREE AND ORDER.

After extensive pretrial proceedings and negotiations, the parties presented to the Court a comprehensive settlement document entitled Agreement, to which was attached a series of documents labeled policy statements relating to various substantive areas of prison operations. This voluminous document contains mandatory and prohibitive injunctions, often of great specificity, relating to a broad range of conditions and practices at the Penitentiary of New Mexico.⁴

By an order dated July 14, 1980, the Court, finding that the agreement represented a compromised settlement of

³ The Court's jurisdiction over the state constitutional and statutory law claims was posited on principles of pendent jurisdiction.

⁴ The subjects of the consent decree are correspondence, public and attorney visitation, food service, legal access, visitation, classification, living conditions, inmate activity, medical care, mental health care, staffing and training maximum security and inmate discipline. Critically, each of these areas relates to one or more of the factual allegations set out in the first amended complaint, and incorporated into the first claim for relief, predicated on rights secured by the United States Constitution. First Amended Complaint, ¶¶ 15-32 (factual allegations) and ¶¶ 33-34 (First Claim for Relief). The precise correlation of the portions of the consent decree and the paragraphs of the first amended complaint is analyzed in n.21, below.

the disputes between the parties, provisionally approved the comprehensive consent judgment. The July 14 order, which itself was entered by consent, includes standard prefatory language by which the Court acknowledged that the defendants disavowed liability and that the parties agreed to limit the admissibility of the document.

Paragraph 2 of the July 14 order states that the consent decree "may include specific requirements and procedures beyond what is required by the Constitution of the United States." The order provides further for redefinition of the plaintiff class "to include all those inmates who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close or medium security facility opened for operation by the state of New Mexico after June 12, 1980."

Finally, the July 14 order directed that notice of the order and settlement be provided to all members of the class, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The July 14 order stated that the Court had examined the agreement and found that it represented a compromise settlement of the disputes of the parties. Following that review, under Rule 23, the Court gave tentative approval of the decree, stating that its approval was "provisional until fifteen (15) days after said notice." The order was to "become final if not rejected [by the Court] or modified by agreement of the parties based upon said objections [from the plaintiff class] within thirty (30) days."

Pursuant to that provision, the objection process commenced. Two objections from the plaintiff class were submitted to the Clerk, as mandated by the class notice, but neither objection was sufficient to provoke the Court's rejection of the consent judgment. In the absence of a motion from the parties to modify the judgment, the July 14 order, approving the consent decree and adopting it as an order of the Court, became final.

III. PROCEEDINGS SINCE ENTRY OF THE CONSENT DECREE.

The litigation did not terminate with entry of the consent judgment and order. Since 1980, extensive activity has taken place within the litigation, including recurrent allegations by the plaintiff class of contumacious conduct on the part of the defendants. In 1983, with the agreement of the parties, the Court appointed a special master and a deputy special master, pursuant to Rule 53, Fed. R. Civ. P., to monitor the state of the defendants' compliance with all remedial orders entered in this cause. Order of Reference, June 3, 1983. Since that time, the special master has filed twenty reports on defendants' state of compliance, totaling more than 2,000 pages setting forth findings of fact as to the state of defendants' compliance, as well as a volume of over 700 separate findings of fact relating to the state of defendants' compliance as of early 1986. Those reports have provided a factual basis for the entry of numerous orders by the Court approving the special master's findings. Additionally, the parties have entered into several stipulations provoked by the findings of the special master and the orders of the Court.

Because of the fundamental jurisdictional claim raised in defendants' motion to vacate, this history is not relevant to the Court's consideration of that motion. It serves to show, however, that it has provided the Court with a vast factual record in this case which has informed the Court's evaluation of the consent decree in determining the federal constitutional rights of the plaintiff class and the scope of equitable relief required to redress deprivation of those rights.

IV. DEFENDANTS' MOTION TO VACATE.

A. *Prior Motions*

On June 12, 1987, the defendants filed their motion to vacate portions of the 1980 decree. At the time this

motion was filed, defendants' motion to modify the decree, and plaintiffs' motion seeking a finding of contempt against defendants, both of which were filed in December 1985, were pending before the Court. For the purpose of those pending motions, the Court had compiled, through the efforts of the special master, an extensive factual record describing defendants' state of compliance, as of 1986, with the outstanding remedial orders.⁵ Additionally, in December 1986, the Court heard extensive testimony relating to the parties' December 1985 motions.

While the 1985 motions were pending decision, defendants filed, on February 6, 1987, a motion seeking to modify a single provision of the consent decree requiring single-celling at all institutions subject to the orders in this case. Then, while it was pending, defendants gave notice of their intent to withdraw, without prejudice, the February 6, 1987, motion to modify. Withdrawal of that motion was granted in the Court's order of June 4, 1987. The defendants, by letter to the Court, suggested that the Court withhold ruling on the pending motions to modify the remedial decree until the defendants could file a different, broader motion. Presumably, the instant motion to vacate, filed June 12, is that motion.

B. The June 12, 1987 Motion to Vacate

The defendants' motion to vacate seeks to modify the 1980 decree by eliminating from it all provisions that, in the view of the defendants, are not based on federal law, or which cannot be construed plausibly as remedial measures designed to correct federal constitutional violations. The defendants contend that the eleventh amendment to the United States Constitution and derivative considera-

⁵ The process by which that record was described is set out in the Court's order of January 10, 1986.

tions of comity require elimination from the decree of any provisions that do not enforce federal rights.

The defendants essentially contend that "portions of the 1980 consent decree create rights that are not grounded in federal law and thus cannot be enforced by a federal court." This argument has two essential threads: *first*, that federal courts do not have authority to enter orders against states, or against state officials acting in their official capacity, except to vindicate federal rights; and *second*, that in entering orders designed to vindicate federal rights, federal courts are constrained to limit those orders to measures required to protect those federal rights. The first is based on the principle of sovereign immunity embodied in the eleventh amendment to the United States Constitution. The second is based on judicially created considerations of federalism and comity which, in defendants' view, are implicit in, or at least derivative from, the eleventh amendment principle.

Defendants' motion to vacate ultimately raises questions regarding the nature of the eleventh amendment immunity afforded to states and state officials and the relationship of that immunity to causes of action and remedial relief. Additionally, defendants' motion asserts that the judicially created doctrine of comity is rooted in the eleventh amendment and embodies constraints on the exercise of jurisdiction over causes of action.

Full and fair assessment of these complex, detailed arguments requires a careful analysis of the eleventh amendment, sovereign immunity, the nature of federal constitutional rights, the jurisdiction of federal courts over causes of action based on state rights, the nature of comity as a restraint on jurisdiction and/or relief, and the effect of these considerations when the Court enters a judgment by consent rather than a judgment following an adversary adjudication.

V. THE ELEVENTH AMENDMENT, SOVEREIGN IMMUNITY AND FEDERAL JURISDICTION.

A. *The Eleventh Amendment, Sovereign Immunity—Federal Rights*

The eleventh amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of Another State, or by Citizens or Subjects of any Foreign State.

Although its language is to the contrary, the amendment has been construed to prohibit suits against a state brought by its own citizens as well as those brought by citizens of another state. *Hans v. Louisiana*, 134 U.S. 1 (1890).⁶ It is established, then, that the eleventh amendment shields the states from suit even when state actions are alleged to be in violation of the United States Constitution.

⁶ There is considerable disharmony among the current members of the United States Supreme Court as to the validity of the holding in *Hans*. Justices Brennan, Marshall, Blackmun and Stevens have expressed their opinion that *Hans v. Louisiana*, and the derivative holding in *Edelman v. Jordan*, 415 U.S. 651 (1974), "cannot be reconciled with the federal system envisioned by [the Constitution]." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 303 (1985) (Justice Blackmun, joined by Justices Marshall, Brennan and Stevens, dissenting).

Justice Scalia has expressed his view that "the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it, [are] complex enough questions that I am unwilling to address them in a case whose presentation focused on other matters." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. —, 97 L. Ed. 2d 389, 411 (1987) (Justice Scalia concurring in part and concurring in the judgment).

Notwithstanding the possible infirmity of *Hans*, its holding must be, and is, fully accepted for purposes of the present discussion.

That doctrine, by its terms, undermines the supremacy of federal law and is therefore in derogation of the supremacy clause of the United States Constitution. Art. VI, § 2. The Supreme Court avoided this unacceptable result by its essential ruling in *Ex Parte Young*, 209 U.S. 123 (1908). In *Young*, the Court held that the eleventh amendment does not bar an action against a state official alleging that the official's conduct violated the United States Constitution. In order to redeem the holding in *Young*, and thereby secure the supremacy of federal law, the Supreme Court developed a now-famous analytical form: when the official actions of a state official come into conflict with the superior authority of the United States Constitution, the officer "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex parte Young*, *supra* at 159-60.⁷

The legal precept of *Ex Parte Young* is this: a state inherently lacks the authority to authorize one of its officers to act in a manner that violates the United States Constitution. Therefore, any officer acting in violation of the United States Constitution is acting *ultra vires*. In so acting, the state official forfeits his representative character, and loses the sovereign immunity that, under the eleventh amendment, shields official state action from challenge in federal court. In other words, *Ex Parte Young* approves equitable actions against state officials in their individual capacities for violations of constitu-

⁷ The obvious paradox of this construct—that such actions by state officials are "state action" for purposes of the fourteenth amendment but not for purposes of the eleventh amendment—has been recognized by the Court, but has not undermined the vitality of the principle. *See Florida Dep't of State v. Treasurer Salvors, Inc.*, 458 U.S. 670, 685 (1982).

tional rights, the eleventh amendment notwithstanding. Thus, *Ex Parte Young* enables plaintiffs to allege "state action" sufficient to trigger the fourteenth amendment without automatically raising the bar of the eleventh amendment.⁸

It is not always easy to determine when an action in federal court is against the state, and therefore barred by the eleventh amendment, and when it is against state officials acting in contravention of federal rights and therefore outside the shield of the eleventh amendment. But, the Court need not explore the nuances of that inquiry for purposes of addressing the present issue. It is sufficient to observe that equitable actions against state officials, seeking prospective injunctive relief to correct federal constitutional deprivations, are permissible.⁹

B. *The Eleventh Amendment and Sovereign Immunity—State Rights in Federal Court.*

The rationale that supports *Ex Parte Young*—vindication of the supremacy of federal rights—does not apply to actions in federal court in which plaintiffs seek vindication of rights based on state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), presented the question of "whether a federal court may award injunctive relief against state officials on the basis

⁸ This principle is further elucidated in *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913) which establishes the fourteenth amendment as a substantive rule of conduct binding on state officials individually regardless of whether or not the state has officially sanctioned their actions.

⁹ Actions of this kind are not barred by the eleventh amendment even if they will have a significant effect on the state treasury. *Edelman v. Jordan*, *supra* at 660-73. "Such an ancillary effect on otherwise sovereign affairs of the state is a permissible and often inevitable consequence of the principle announced in *Ex Parte Young*." *Id.* at 668.

of state law." 465 U.S. at 91.¹⁰ The Court answered the question in the negative, noting that

[i]n such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

465 U.S. at 106.

The holding in *Pennhurst* is simply stated: the eleventh amendment prohibits a federal court from awarding injunctive relief against state officials on the basis of state law.¹¹

¹⁰ The state law claims in *Pennhurst* were pendant to federal constitutional and statutory claims. After holding that the eleventh amendment prohibits injunctive relief against state officials based on state law, the Court in *Pennhurst* assessed the effect of the principle on federal court pendant jurisdiction. The Court held that pendant jurisdiction does not overcome the bar of the eleventh amendment, noting that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the state that is protected by the Eleventh Amendment. We now hold that this principle applies as well to state law claims brought into federal court under pendant jurisdiction." 465 U.S. at 121.

¹¹ Defendants extrapolate from *Pennhurst* three significant principles:

1. An extension of federal judicial power cannot be predicated on violation of state law. (This formulation is, of course, overly broad. The holding in *Pennhurst* is that the eleventh amendment proscribes the exercise of federal judicial power against states on the basis of a state's own law. There is nothing in *Pennhurst* to suggest that other forms of pendant jurisdiction are unconstitutional.)

2. There is a specific constitutional basis for the comity principle, with attendant limitations on the situations in which a consent decree can be treated as a waiver by a state of its

VI. THE SCOPE OF REMEDIAL POWER— COMITY AND EQUITABLE DISCRETION.

The preceding section discussed limitations arising from the eleventh amendment on the power of federal courts to assume jurisdiction over suits involving causes of action based on (a) federal or (b) state law. The constitutional constraints operate at the most fundamental level to deprive federal courts of authority, *ab initio*, to take cognizance of legal claims. Apart from these doctrines, other considerations, arguably implicit in the constitutional scheme but ultimately creations of wise judicial policy, restrain federal judicial action in the determination of remedies. These principles operate after the threshold question of federal jurisdiction has been answered in the affirmative and a deprivation of federal rights has been found to exist. The most common term for this principle of restraint is comity.

One is hard-pressed to define comity, although the concept pervades contemporary jurisprudence, particularly in the area of institutional reform litigation. The essence of comity is restraint, both in adjudicating matters and in imposing remedies. First, comity requires that federal courts be reluctant to scrutinize the operations of state institutions in search of federal constitutional infirmities. Second, faced with proof of a violation of federal rights, federal courts should intervene only to the extent required to vindicate those rights. In doing so, federal courts should not "impose upon [governmental agencies]

immunity from excessive federal decrees. (This is an unsupported conclusion; the error, which is at the heart of defendants' argument, is discussed at length in Section VIII, below.)

3. The eleventh amendment creates a jurisdictional limitation on federal judicial power, thereby rendering decrees entered in violation of that limitation void. (This principle as stated is correct, but is inapplicable to the present case for reasons discussed at length in this memorandum.)

See Defendant's brief, p. 12.

their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486 (1971).¹²

These considerations of restraint in no way vitiate the fundamental constitutional tenet that federal courts are empowered to vindicate federal rights, notwithstanding sovereign immunity or judicial restraint. Defendants' ignore the distinction in the comity principle between restraint in adjudicating claims and restraint in formulating remedies, a critical distinction explicitly acknowledged in the authorities relied upon by the defendants. For example, in their brief, the defendants cite *Smith v. Sullivan*, 611 F.2d 1039, 1045 (5th Cir. 1980), for the proposition that "courts . . . may not become enmeshed in the minutiae of prison operations" (internal citations omitted). In *Smith*, however, the quoted passage is immediately preceded by the obvious qualification, "unless acting to remedy federal constitutional violations as part of a totality approach." *Id.*

Defendants also rely on *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983), *cert. dismissed*, *Meachum v. Battle*, 465 U.S. 1014 (1984), as authority for the related but separate strands of their comity argument—separation of powers and pragmatic restraint. *See De-*

¹² Defendants correctly point out that the "principle of restraint is derived from several interrelated concerns." Defendants' brief p. 4. First, the principle of separation of powers cautions against the usurpation, by the judiciary, of functions properly charged to the legislative and executive branches of the government. *Bell v. Wolfish*, 441 U.S. 520, 548 (1979); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). Apart from this general principle, practical restraints dictate that the judiciary should be loath to assume the task of restructuring the operations of state government. Particularly where the daily operation of a corrections facility is in question, the judiciary should not lightly assume responsibility for making the day-to-day decisions that require a closer familiarity with the institution than is possessed by the court. *See generally Bell v. Wolfish, supra* at 547; *Procunier v. Martinez, supra* at 405.

fendants' brief, p. 6.¹³ In *Battle*, however, the Court of Appeals for the Tenth Circuit analyzed comity principles precisely as the Court does here. Recognizing the "reluctance of federal courts to intervene in matters of prison administration," the court of appeals nonetheless approved the district court's conclusion that the principle of comity "was not a justifiable basis for failure to take cognizance of valid federal constitutional claims relating to rights secured to inmates by the federal Constitution and the laws of the United States." 564 F.2d at 392, citing *Procurier v. Martinez*, *supra* at 817, *Cruz v. Beto*, 405 U.S. 319 (1972), and *Johnson v. Avery*, 393 U.S. 483 (1969).

Defendants also rely on a subsequent opinion in *Battle v. Anderson*, 708 F.2d at 1523, and quote from that opinion an article from the *Harvard Law Review* by Professor Owen Fiss. Again, the matter is taken out of context, and ignores the holding of the court. In fact, the 1983 *Battle* opinion sets out simply and explicitly a doctrine of equitable judicial power that serves to counterbalance, and ultimately overcome, whatever limitations might be generated by the principle of comity. The court observes that "the court, in exercising continuing jurisdiction to achieve structural reform, cannot terminate its jurisdiction until it has eliminated the constitutional violation 'root and branch'." 708 F.2d at 1538, citing *Green v. County School Board*, 391 U.S. 430, 438 (1968). Thus, the Court of Appeals for the Tenth

¹³ Throughout their brief, defendants entwine the concept of comity with that of separation of powers. For example, defendants quote the Supreme Court's opinion in *Bell v. Wolfish*, noting that intrusive judicial decrees usurp the role preserved under our constitutional system for the "legislative and executive branches of our government, not the judicial." 441 U.S. at 548. Separation of powers arguments have no role, however, where properly named defendants are charged with violations of federal rights and are held accountable for those violations by injunctions that mandate specific measures designed to reinstate and protect constitutional rights.

Circuit has directly applied to institutional reform litigation the vital principle that a federal court's equitable powers are inherently sufficiently broad to allow federal courts to fashion effective injunctive relief to cure federal constitutional violations. The nature of the remedy for deprivation of federal constitutional rights is determined by the nature and scope of the constitutional violation. *Swann v. Charlotte Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). Once a constitutional violation is established, remedial decrees may require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. *Green v. County School Board, supra*; *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).¹⁴

The principles of equitable breadth and flexibility are at some tension with the doctrine of comity. This tension, however, is superficial; ultimately the doctrines are consistent. The preservation of the supremacy of federal law that animated *Ex Parte Young* serves as well to reconcile the facial inconsistency of these doctrines. First, *Ex Parte Young* makes clear that federal courts are authorized to vindicate federal rights, the principle of sovereign immunity notwithstanding. Second, where fed-

¹⁴ It is worth noting that the holding in *Milliken II* followed the Supreme Court's holding in *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717 (1974), where the Court noted that the Court's equitable remedy must be related to "the condition that offends the Constitution." 418 U.S. at 738. *Milliken I* and *Milliken II* therefore establish the fundamental principle that a remedial decree entered to correct constitutional violations must be designed as nearly as possible to correct the constitutional violation *and* to restore the victims of unconstitutional conduct to the position they would have occupied in the absence of such conduct. This formulation is merely a more elaborate restatement of the principle embraced by the court of appeals in *Battle v. Anderson* that constitutional violations must be eliminated "root and branch." 708 F.2d at 1538.

eral constitutional rights have been traduced, principles of restraint, including comity, separation of powers and pragmatic caution, dissolve; federal courts are empowered and required to design equitable remedies that are effective to cure constitutional violations. In this tailoring of remedies, of course, the preferred course is to preserve as much discretion for state administrators as possible. Yet, where constitutional rights have been violated, comity does not require, or even permit, a federal court to countenance those violations. It thus is clear that in entering remedial decrees, such decrees should be (a) designed to be effective, (b) tailored to the constitutional violations, and (c) fashioned to restore victims to their positions before the constitutional violations. *See* n. 14, above. In guaranteeing that federal injunctions will be effective within these parameters, however, federal courts should be mindful of state sovereignty and should intrude as little as necessary on state prerogatives.

Thus, it is apparent that, whatever restraints are imposed by comity considerations, these limitations are not jurisdictional. Since there is no jurisdictional bar to a court's evaluating claims of federal constitutional violation, even in a setting as delicate as that involving the operations of a state institution, the consequent limitations on a court's assessment of a consent decree presented to the court by the parties, are *not* jurisdictional. Indeed, when a remedy has been fashioned with the participation and consent of the state, and that remedy is presented to the court, the role of judicial restraint is problematic. In such a situation, it is the prison administrators themselves who are proposing the remedy. Absent a limitation on assuming jurisdiction over the proposed remedy, the court must make two inquiries: first, is the remedy sufficient to protect the interests of the plaintiff class? (This inquiry is mandated by Rule 23 of the Federal Rules of Civil Procedure.) Second, is the relief illegal? *Local No. 93 (Firefighters) v. City of*

Cleveland, 478 U.S. —, 92 L. Ed. 2d 405 (1986) (a federal court may enter a consent decree that provides relief greater than the court might have awarded after trial, unless the relief is illegal).

VII. PRELIMINARY CONCLUSIONS OF LAW.

Before undertaking a discussion of the weaknesses in defendants' jurisdictional argument, certain fundamental principles, derived from the foregoing discussion, should be set out.

1. The eleventh amendment bars a suit of any kind against a state in its own name. *Hans v. Louisiana*, *supra*.
2. The eleventh amendment bars a suit against a state official when the suit, in essence, is one that would operate against the state. *Edelman v. Jordan*, *supra*.
3. The eleventh amendment bars a suit against the state official seeking injunctive relief based on state law. *Pennhurst State School & Hospital v. Halderman*, *supra*.
4. The eleventh amendment does not bar a suit against a state official seeking injunctive relief, alleging that the state official has violated federal law and seeking only prospective relief. *Ex Parte Young*, *supra*.
5. In fashioning a remedy for constitutional violations, the court should tailor its remedy to constitutional violations, yet insure that the remedy effectively cures the constitutional violations and restores the victims to their positions before the constitutional violation. *Swann v. Charlotte Mecklenberg*, *supra*; *Green v. County School Board*, *supra*; *Battle v. Anderson*, *supra*.

VIII. DISCUSSION.

Defendants' argument rests on a fundamental confusion and misapplication of two principles: the jurisdictional limitations derived from the eleventh amendment,

and the equitable considerations derived from the principle of comity.

Plaintiffs' first amended complaint, as observed previously, set forth extensive factual allegations, relating to virtually every facet of the operation of the Penitentiary of New Mexico. Plaintiffs' first claim for relief alleged that, on whole, the factual conditions at the Penitentiary of New Mexico deprived the plaintiff class of rights secured by the United States Constitution. As a threshold matter, then, federal jurisdiction over the civil action existed by virtue of 28 U.S.C. §§ 1331 and 1343(3).

As a matter of fundamental due process, the defendants had the right to challenge the factual allegations set out in the complaint and thereby put the plaintiffs to their proof. Through the adjudicative process, defendants had the right to challenge the conclusion of law that the conditions alleged and proved by the plaintiffs, viewed in their totality, violated the constitutional rights of the plaintiff class. By agreeing to the entry of a consent judgment, however, the defendants waived their right to trial on the factual allegations and adjudication of the legal conclusion. *See generally Swift & Co. v. United States*, 276 U.S. 311, 316 (1928); *Local No. 93 (Firefighters) v. City of Cleveland*, *supra*.

Following the waiver of the right to proof of violation, the next step in the process of adjudication became the fashioning of appropriate remedies. The parties presented to the Court an agreed remedial order. In doing so, the defendants waived their rights to the restraints of comity in the selection of equitable remedies.¹⁵ Indeed, judicial application of such restraints in the face of a remedy proposed by the defendants would be anomalous.

¹⁵ This is not to suggest that the defendants waived eleventh amendment limitations. As set out in this order, because of the federal basis for the plaintiffs' claims for relief, those limitations were not at issue in this action.

Faced with a proposed consent decree, setting out relief that is the product of agreement of the parties, the Court is under an obligation to address only three issues:

First, is the complaint, which serves as the sole judicial cognizable basis for jurisdiction, sufficient to invoke federal jurisdiction? That inquiry is easily satisfied, as set out above.

Second, is the relief illegal? Nothing in the consent decree requires action, or refraining from action, on the part of state officials in a manner that would violate the law. Thus, the consent decree does not violate the principle established by the United States Supreme Court in *Local No. 93 v. City of Cleveland, supra*.

Third, is the relief adequate to protect the interest of the plaintiff class? As discussed in section II, above, this inquiry, governed by Rule 23, Fed. R. Civ. P., was conducted and the Court's conclusion is supported. Thus, the Court, in exercising power over a civil action that properly invoked federal jurisdiction, approved a remedial order the content of which was the product of free, unhindered, plenary negotiations between the parties.

The defendants' motion to vacate portions of the order is based on the assertion that, notwithstanding the existence of a complaint properly invoking federal jurisdiction and the proper entry of a lawful consent decree, any portions of the consent judgment that are not grounded in federal law, or that cannot plausibly be viewed as remedies for federal violations, are void as a matter of jurisdiction. This legal position involves two distinct errors.¹⁶

¹⁶ Another fundamental error—the discussion of waiver—is also at the heart of defendants' position. Because this issue is irrelevant, it will not be treated in the text. The discussion of waiver in defendants' brief contends that any waiver of the state's sovereign immunity was unauthorized as a matter of law, and therefore is ineffective, at least as a constraint on the conduct of successor

Defendants construe *Pennhurst* as holding that "the Eleventh Amendment deprives a federal court of the power to award any relief, injunctive or otherwise, against state officials sued in their official capacity, except where that relief is premised on federal law." Defendants' brief, p. 11. This construction of *Pennhurst* is entirely accurate. Defendants' argument from *Pennhurst*, however, transmutes the pronounced principle into a limitation on remedy. This distortion is a fundamental error which undermines defendants' argument. Careful analysis of *Pennhurst* demonstrates that the eleventh amendment immunity identified and applied in that case is a product of the cause of action alleged by the *Pennhurst* plaintiffs and relied upon by the Court as a predicate for relief. This critical fact, which is ignored by defendants, is demonstrated unequivocally at several places in the opinion. The Court stated the question before it to be "whether the claim that petitioners violated *state law* in carrying out their official duties at *Pennhurst* is one against the state and therefore barred by the Eleventh Amendment." 465 U.S. at 103 (emphasis in original). The *Pennhurst* Court concluded "that *Yeung* and *Edelman* are inapplicable in a suit against state officials on the basis of state law." *Id.* at 106. Finally, the Court described its holding to be that "federal courts lack jurisdiction to enjoin state institutions and state officials on the basis of this state law." *Id.* at 124-25. The clear implication of *Pennhurst*, however, is

officials. As demonstrated in the text, the state defendants named in the first amended complaint were not protected from the allegations of that complaint by virtue of sovereign immunity. The complaint alleges federal constitutional violations and seeks injunctive relief to correct those violations. In the face of such allegations, and a federal cause of action structured in the manner of the first amended complaint, state officials, properly named, do not enjoy sovereign immunity. Accordingly, the question of waiver of sovereign immunity did not arise in this proceeding. Rather, the relevant waivers were of proof of constitutional violation and of comity-based constraints in the form of equitable relief.

that entry of relief would be appropriate if necessary to vindicate the supremacy of federal law.

Defendants also ignore the connection of the holding in *Pennhurst* to the cause of action upon which the district court predicated its award of injunctive relief. Moreover, their characterization of *Pennhurst* as a limitation on the scope of relief in the face of federal violation is unsupported. Indeed, since *Pennhurst* involved no proof of federal violation, any interpretation of *Pennhurst* as a limitation on relief for violations of federal law is unwarranted.

The mischaracterization of *Pennhurst* is most clearly revealed on page 12 of defendants' brief, where they assert that "*Pennhurst* recognized a specific constitutional basis for the comity principle, with attendant limitations on the situations in which a consent decree can be treated as a waiver by the state of its immunity from excessive federal decrees." This assertion is puzzling, for at least two reasons. First, the Supreme Court specifically announced that it did not need to reach the issue of comity, because it found "the Eleventh Amendment challenge dispositive." 465 U.S. at 97. Second, *Pennhurst* had nothing to do with a consent decree, and contains no statement whatever as to the limitation on remedies agreed to by consent. This critical component of defendants' argument from *Pennhurst* is, in fact, unsupported by that case.

Lelsz v. Kavanagh, 807 F.2d 1243, *reh'g denied*, 815 F.2d 1034 (5th Cir. 1987), similarly does not support defendants' argument. In *Lelsz*, the court of appeals reviewed an order entered to enforce provisions of a consent decree that had been entered two years earlier. The underlying action raised federal constitutional and state law claims relating to treatment of the plaintiff class which was comprised of mentally retarded patients housed in state schools. The consent decree approved by

the court consisted of numerous provisions relating to treatment of the mentally retarded. Slightly more than one and one-half years after entry of the consent decree, the plaintiffs filed a motion for community placement, alleging that the transfer of members of the plaintiff class to community facilities was necessary to achieve compliance with the consent decree. Following a hearing on the motion, the court entered an order directing transfer to community centers. That order was appealed and is the subject of the opinion in *Lelsz*.

The court of appeals vacated the enforcement order. The court noted first that the order approving the underlying consent decree "painstakingly illicits the constitutional or statutory basis for relief afforded in every significant paragraph of the [consent decree]. That order readily demonstrates that any rights the class members may have with regard to community placement were understood by the district court to originate in, and do in fact exist in, state law." 807 F.2d at 1247.¹⁷ This conclusion required the court of appeals, pursuant to *Pennhurst*, to conclude that the relief granted was grounded solely on state law.¹⁸

¹⁷ The court concluded on the basis of a clear record, that the relief in the consent decree was predicated *solely* on state law. This conclusion left the question for the *Lelsz* court as to "whether the district court may enforce the consent decree beyond the guarantees contained in the federal Constitution and laws simply because it is a consent decree." The court held ultimately that such enforcement violated the eleventh amendment. That question is inartfully formed, however, since the precise question was whether a district court can enforce a consent decree based solely on state law. The *Lelsz* court held that such enforcement violated *Pennhurst*. To the extent the *Lelsz* court answered a broader question, that answer is dicta. See discussion of *Ibarra v. Texas Employment Comm'n*, below.

¹⁸ This conclusion was strongly attacked by Judge Reavley in an opinion dissenting from the denial of a petition for rehearing *en banc*. See 815 F.2d at 1035-37. Seven of the fourteen judges voting

Lelsz has been interpreted in *Ibarra v. Texas Employment Commission*, 823 F.2d 873 (5th Cir. 1987). *Ibarra* construed *Lelsz* as applying *Pennhurst* to vacate a portion of the district court order enforcing the consent decree when the relief provided by that part of the decree was grounded solely on state law. 823 F.2d at 877, citing *Lelsz*, 815 F.2d at 1034. The *Ibarra* court held:

Assuming without deciding that *Pennhurst* would extend to a federal court order approving a consent decree, we conclude that *Pennhurst* does not apply to the present case because the consent decree is not based on state law. . . . The concerns about state sovereignty and the lack of any federal interests that were critical to *Pennhurst* are not appropriate when, as in this case, the issue is one of interpreting federal law.

Thus, any implication that the *Lelsz* holding went beyond an application of *Pennhurst* to a consent decree based solely on state law is eliminated dispositively by *Ibarra*.¹⁹

Lelsza, as clarified in *Ibarra*, then, reads *Pennhurst* to hold that a federal court does not, under *Pennhurst*, have jurisdiction to approve a consent decree predicated solely on state law violations since to do so would offend the eleventh amendment.²⁰ This doctrine has no bearing,

dissented from the denial of the motion for rehearing. Of particular note is the following portion of Judge Reavley's dissent:

In a contested case, in which a pendent state-law claim is asserted, *Pennhurst*, requires the federal court to look at the source of the claim, but where the parties have not separated their claims and remedies and agree on remedies for both, *Pennhurst* itself places no jurisdictional limitation upon the federal court in enforcing the agreement

Lelsz, 815 F.2d at 1036.

¹⁹ Cf. *Welsch v. Gardebring*, 667 F. Supp. 1284, 1289 (D. Minn. 1987), which is discussed below in note 22.

²⁰ Again, Judge Reavley's distinction between a pure state law claim, and mixed claims, is critical but ignored in *Lelsz*.

however, on the present case. Here, the plaintiffs' first amended complaint alleged violations of federal law. In response to that complaint, the parties agreed to entry of comprehensive relief. It is literally true that every substantive section of the consent decree is tied to factual allegations in the first amended complaint, which form the factual predicate for plaintiffs' claim that the totality of conditions at the Penitentiary of New Mexico offends the United States Constitution.²¹

The foregoing discussion produces two clear conclusions, each of which mandates rejection of each separate strand of defendants' argument.

First, because the complaint named state officials in their official capacity as defendants in a suit seeking purely injunctive relief for federal constitutional violations, the eleventh amendment did not afford defendants sovereign immunity. Accordingly, the Court had, and has, jurisdiction over the civil action. *See Welsch v. Gardebring*, 667 F. Supp. at 1288-89.²²

²¹ The following chart demonstrates the relationship between paragraphs in the first amended complaint and portions of the consent decree.

Correspondence—	¶ 28
Public/Attorney Visitation—	¶ 27
Food Service—	¶ 21
Legal Access—	¶¶ 30, 31
Visitation—	¶ 27
Classification—	¶ 24
Living Conditions—	¶¶ 16, 17, 18, 19, 20
Inmate Activity—	¶¶ 19, 24, 25, 26
Medical Care—	¶ 29
Mental Health Care—	¶ 29
Staffing and Staff Training—	¶¶ 22, 23
Maximum Security—	¶ 23
Inmate Discipline—	¶ 32

²² In *Welsch v. Gardebring*, the defendants, in challenging the court's jurisdiction to approve a consent decree, made essentially the same argument which is presented here in defendants' motion. The district court's rejection of that argument is predicated on

Second, because each element of the relief afforded in the consent decree is tied to a factual allegation in the complaint asserting federal constitutional violations based on the totality of the circumstances, the Court had jurisdiction to enter the consent decree.²³ Thus, defendants' argument that the consent decree approved by the Court in this case is void because it abrogates the state's eleventh amendment immunity, is unavailing.

analysis of *Pennhurst, Ex Parte Young*, and *Local No. 93 v. City of Cleveland*, as is done in this opinion.

²³ Defendants' reliance on *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), is also misplaced. In *Penwell*, the defendants sought to vacate a provision of the consent decree that required the state to find a prisoners' legal services organization at a defined level. That provision had been entered by consent in response to a claim that indigent Oregon prisoners were provided with inadequate legal facilities. The court of appeals affirmed the district court's decision vacating the challenged portion. In doing so, the court noted that the provision on its face ran against the State of Oregon and did not limit the decree to the defendants' best efforts to obtain state funding. 700 F.2d at 574. As such, the provision ran afoul of the eleventh amendment. It has long been established that a court order running directly against the state treasury violates the eleventh amendment. See, e.g., *Edelman v. Jordan, supra*.

Certain language in *Penwell* suggests that the funding provision is unenforceable not only because it runs directly against the state but also because it is more than is required to alleviate violations of federal law. This language, however, must be viewed in context of the full discussion of the case, which notes that "if general legal services for prisoners were required by the Constitution, we might be able to enforce this provision, notwithstanding the state's protest." 700 F.2d at 574. That language follows immediately the court's discussion of *Edelman* and *Young*. In this context, then, the *Penwell* holding must be stated as follows: Where a provision in a federal court order explicitly runs directly against the state treasury, and cannot be construed as a provision enforcing federal law which will have an ancillary effect on the state treasury (thereby bringing the injunction within the scope approved by *Edelman*), the provision is unenforceable. So construed, *Penwell* does not apply to the present circumstance. First, there is no provision in the consent decree in this case that specifically requires funding

The second major premise of defendants' argument is that even when federal jurisdiction exists, the principle of comity prohibits the entry of relief, even by consent, that extends beyond the measures the Court could have imposed following trial. There is no authority cited by the defendants or discovered by the Court that supports this novel proposition. Indeed, the same proposition was rejected by the United States Supreme Court in *Local 93 (Firefighters) v. City of Cleveland, supra.*²⁴

In *Firefighters*, the Supreme Court reviewed a consent decree that indisputably granted to plaintiffs substantive relief that went beyond what could have been granted following a trial on the merits. Faced with a challenge that such relief was unauthorized for that the reason, the Supreme Court rejected the contention. As made clear by a lengthy discussion of the nature of consent decrees, the Court concluded that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." 92 L. Ed. 2d at 425. In fact, the Supreme Court held that relief in the form of a consent judgment is constrained only by principles of illegality in that a federal court cannot approve relief that would require a violation of substantive law. There is, of course, nothing in the consent decree in this case which requires the defendants to violate any law.

Defendants' attempt to apply the principles of comity and restraint to the Court's review of a consent decree also suggests a peculiar paradox. Were the Court to re-

by the State of New Mexico. Second, every section of the consent decree in this case is tied to an allegation of federal constitutional deprivation.

²⁴ Defendants' citation to *Nelson v. Collins*, 659 F.2d 420, 429 (4th Cir. 1981) (*en banc*), is inappropriate. In *Nelson v. Collins*, no constitutional violation was established. Understandably, when there is no violation, equity has no standing to provide a remedy. *Nelson* does not support any other principle.

ject a consent judgment, agreed to by the defendants, on the basis of comity considerations, it would thereby be arrogating the authority of duly empowered state officials to determine the proper operation of state institutions—precisely the judicial act that most offends the defendants. The essence of the consent decree—its animation, in the words of the Supreme Court (*see Fire-fighters, supra* at 425)—is the consent of the party. Here, the properly named state officials, following negotiations, freely agreed to provisions that would govern the operation of the state's prisons. It would be a bizarre perversion of the principle of comity to suggest that a federal court is required, in order to preserve state autonomy, to override the decisions of state officials and substitute its own judgments.

Several references to defendant's brief will suffice to demonstrate the internal contradiction of defendants' argument. In footnote 1, page 2, the defendants contend that "a federal court ordinarily should accept any reasonable remedial proposal made by . . . defendants," citing *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 971 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983). "A federal court is not empowered to 'impose upon [governmental agencies] their views of what constitutes wise economic or social policy.'" Defendants' brief at p. 4, citing *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Federal courts should exercise "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 111 (1981).²⁵

²⁵ *McNary* is the only case this Court has discovered that discussed comity as a jurisdictional constraint. Of course, *McNary* arose in the peculiar and unique context of a challenge to a state taxing scheme. The restraint on the federal court in such an action derives from the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits district courts from enjoining state tax activities where

This Court had no cognizable basis on which to alter the structure or detail of the negotiated consent judgment presented to it for review and approval by the parties.²⁶ Given that the civil action was properly before the Court, its review of that judgment was limited to a determination of whether any of the relief contained in the decree was illegal and whether the relief was sufficient to protect the interests of the plaintiffs' class. The Court conducted the appropriate review and consequently approved the consent decree. There is no basis for the Court's independent application of its judgment as to the propriety of the specific relief agreed to by the parties in view of the appropriate presumption that the parties have negotiated at arms length and have agreed that the structure of remedies in the consent decree is a fair resolution of their competing claims.

IX. MODIFICATION.

Defendants' motion also seeks to vacate portions of the 1980 decree. Although the rule under which this relief is sought is not explicated, the structure of the argument makes clear defendants seek relief under Rule 60(b)(4), Fed. R. Civ. P., which provides that relief from final judgment should be granted when "the judgment is void." *See Defendants' brief*, p. 13. As noted earlier, footnote 1 of defendants' brief suggests that if their comity-based

there is a plain, speedy and efficient remedy in the courts of that state. *See* 454 U.S. at 103. *See also* *Tulley v. Griffin*, 429 U.S. 68, 73 (1976), *quoted in* *Rosewell v. Lasalle National Bank*, 450 U.S. 503, 522 (1981).

²⁶ Indeed, when presented with a consent decree compromising a class action, the Court is limited to one of two actions: approving the decree, or rejecting it. It is elemental that in conducting a Rule 23 review of a proposed class action compromise, the Court may not substitute its judgments of fairness for those of the litigants. Plainly, the Court would be without authority to enter a consent judgment other than that agreed to by the parties, since the consent of the parties would no longer animate the decree.

arguments are rejected at the jurisdictional level, they should inform the Court's assessment of the propriety of modification. As is made clear in this order, defendants' jurisdictional arguments seeking vacation of the decree are rejected in that they are unsupported by existing law. The Court is mindful, however, that under certain circumstances, a judgment may be modified or altered in its prospective application. The potential legal bases for action of this kind need not be set out here, although the Court has addressed the issue as a general matter previously. See Order of October 3, 1986. That order evidences the Court's awareness of *United States v. Swift*, 286 U.S. 106 (1932); *New York Association for Retarded Children, Inc. v. Carey* (Willowbrook), *supra*; *Newman v. Graddick*, 740 F.2d 1513 (1th Cir. 1984), and related cases.

The "flexible" approach to modification set out in *Carey* and related cases permits the Court to assess requests for modification that promote the interest of comity by preserving state administrative discretion as to the means of accomplishing the particular objectives set forth in a decree. That process, however, involves careful assessment not only of the structure of the order and its relationship to administrative discretion, but of other factual considerations including, but not limited to, the state of compliance with existing orders, the degree to which any federal constitutional violations have been cured "root and branch," and the existence of safeguards to prevent future violations. That complex inquiry is one the Court will not undertake in the absence of an appropriate, comprehensive evidentiary record and a thorough briefing on the appropriate standards for modification, to include the equitable bases for modification and the particular modification sought.²⁷

²⁷ The Court is mindful that some endeavor to this end has been undertaken previously. The defendants, however, terminated that process by filing the motion that is the subject of this order.

X. CONCLUSION.

The eleventh amendment does not provide immunity to state officials from equitable actions based on federal constitutional rights. The comity limitations urged by the defendants do not require the Court to interfere with the considered judgments of parties in the fashioning of the consent judgment. The defendants' motion to vacate will be denied.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendants' motion to vacate be, and the same hereby is, denied.

DATED this 11th day of February, 1988.

/s/ Juan G. Burciaga
United States District Judge

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 88-1442 (D.C. No. 77-0721-JB)

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS,
and all others similarly situated,
Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, GOVERNOR OF THE STATE OF NEW
MEXICO, O.L. McCOTTER, SECRETARY OF CORRECTIONS,
and ROBERT TANSY, WARDEN OF THE PENITENTIARY OF
NEW MEXICO, *Defendants-Appellants,*

and

MOUNTAIN STATES LEGAL FOUNDATION, Amici Curiae,
on behalf of its members, the State of Kansas and the
State of Utah,

and

Amici Curiae of the STATES OF HAWAII, OREGON, UTAH,
WASHINGTON, and WYOMING, in support of Appellants.

JUDGMENT

Entered September 15, 1989

Before SEYMOUR, McWILLIAMS, and EBEL, Circuit
Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

No. Civil 77-721-C

DWIGHT DURAN, LONNIE DURAN, and SHARON TOWERS,
and all others similarly situated,

Plaintiffs,
vs.

JERRY APODACA, Governor of the
State of New Mexico, *et al.*,
Defendants.

ORDER

[Signed July 14, 1980; entered July 15, 1980]

THIS MATTER having come on before the Court on the agreement of the parties and the Court being advised that this is a class action proceeding pursuant to Rule 23(b) (1) and (2) of the Federal Rules of Civil Procedure and the class was previously certified as all inmates who are now, or in the future may be incarcerated in the Penitentiary of New Mexico at Santa Fe. By agreement of the parties and because of changed circumstances, the class is hereby amended to include all those inmates who are now, or in the future may be; incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close, or medium security facility open for

operation by the State of New Mexico after June 12, 1980; and the Court having examined the agreement finds:

(1) that the agreement represents a compromised settlement of disputes between the parties;

(2) that the agreement and the policy statements attached thereto and the partial consent decrees on file herein may include specific requirements and procedures beyond what is required by the Constitution of the United States, the Constitution of the State of New Mexico, the Federal Civil Rights Act, the New Mexico Tort Claims Act, or any other constitutional, statutory, or common law requirement. The agreement and the policies attached thereto and the partial consent decrees on file herein are not to be construed to establish or change the standard of culpability for civil or criminal liability of any official, employee, agent, or representative of the State of New Mexico other than for the sole and limited purpose of enforcement of the agreement and the policies attached thereto and the partial consent decrees on file herein.

(3) that the agreement and policy statements attached thereto and the partial consent decrees on file herein were voluntarily and mutually agreed upon by the Defendants and Plaintiffs as a compromised settlement of disputes between the parties and neither the partial consent decrees, nor the agreement and the policy statements attached thereto constitute admissions that any previous or existing condition, policy, procedure, or acts or omissions of the Department of Corrections and the Penitentiary of New Mexico or any state official, employee, or agent was, or is, in any way improper, negligent, unconstitutional, or in violation of any rights of the Plaintiff class. Nothing in this Order or in the agreement and policy statements attached thereto or the partial consent decree on file herein constitute findings of fact or law

with respect to the claims or defenses of the parties in *Duran v. Apodaca*.

(4) that the agreement should not be admissible in evidence in any proceedings or trials other than for the sole and limited purpose of enforcement of this agreement and the policies attached thereto and the partial consent decrees on file herein. Specifically, it is understood and agreed that Rules 407 and 408 of the Federal Rules of Evidence are applicable to this agreement and the policies attached hereto and the partial consent decrees on file herein.

(5) that the agreement is fair and appropriate and should be confirmed and adopted by the Court.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

(1) The agreement of the parties is approved and adopted in all particulars.

(2) The Defendants, their agents, employees, successors in office and those acting in concert with them, are hereby ordered to comply in full with the terms of the agreement and the policies attached thereto and the prior partial consent decrees of this Court.

(3) Pursuant to Rule 23(g) F.R.C.P., the Defendants are ordered to provide notice of this Order and settlement to all inmates presently confined at the Penitentiary of New Mexico. The notice will include a statement that the Order and settlement are provisional until fifteen (15) days after said notice during which time class members may submit written objections to the Order and settlement to the Clerk of this Court. Any such objections will be considered fully by the Court. This Order will become final if not rejected or modified by agreement of the parties based upon said objections within thirty (30) days.

(4) If this Order and settlement becomes final, the Court will maintain jurisdiction for such time as is necessary to enforce or modify this Order and settlement with, if necessary, all appropriate orders including contempt sanction.

Signed this 14th day of July, 1980.

/s/ Santiago E. Campos
United States District Judge

APPROVED BY:

/s/ Ralph I. Knowles, Jr.
Attorneys for Plaintiffs

/s/ Charles Daniels
Attorneys for Plaintiffs

/s/ Ralph W. Muxlow II
Attorneys for Defendants

/s/ David A. Freedman
Attorneys for Plaintiffs

/s/ Jeff Bingaman
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. Civil 77-721-C

DWIGHT DURAN, LONNIE DURAN, and SHARON TOWERS,
and all others similarly situated,

Plaintiffs,

vs.

JERRY APODACA, Governor of the
State of New Mexico, *et al.*,

Defendants.

AGREEMENT

COME NOW the parties and stipulate and agree as follows:

1. The parties have reached agreement on several areas of policy and procedure for operation of the Penitentiary of New Mexico and any other State correctional facility which will house class Plaintiffs, except for minimum security facilities. These areas of agreement are more fully set forth in partial consent decrees on file herein and in various policy statements which are attached to this agreement as Exhibits A through H. These policy statements will be adopted by the Defendants within seven (7) days from the date the Court Order approving this agreement becomes final.

2. These policy statements and the partial consent decrees on file herein may include specific requirements and procedures beyond what is required by the Constitution of the United States, the Constitution of the State of New Mexico, the Federal Civil Rights Act, the New Mexico Tort Claims Act, or any other constitutional, statutory, or common law requirement. This agreement and the policies attached hereto and partial consent decrees on file herein are not to be construed to establish or change the standard of culpability for civil or criminal liability of any official, employee, agent, or representative of the State of New Mexico other than for the sole and limited purpose of enforcement of this agreement and the policies attached hereto and the partial consent decrees on file herein.

3. This agreement and the policies attached hereto and the partial consent decrees on file herein were voluntarily and mutually agreed upon by the Defendants and Plaintiffs as a compromised settlement of disputes between the parties and neither the partial consent decrees, nor this agreement and the policies attached hereto constitute admissions that any previous or existing condition, policy, procedure, or acts or omissions of the Department of Corrections and the Penitentiary of New Mexico or any state official, employee, or agent was, or is, in any way improper, negligent, unconstitutional, or in violation of any rights of the Plaintiff class. Nothing in this agreement or the partial consent decrees on file herein constitute findings of fact or law with respect to the claims or defenses of the parties in *Duran v. Apodaca*.

4. This agreement should not be admissible in evidence in any proceedings or trials other than for the sole and limited purpose of enforcement of this agreement and the policies attached hereto and the partial consent decrees on file herein. Specifically, it is understood and agreed that Rules 407 and 408 of the Federal Rules of Evidence and the Advisory Committee's notes to Rule 407 and 408

and of Rules 407 and 408 of the New Mexico Rules of Evidence are applicable to this agreement and the policies attached hereto and the partial consent decrees on file herein.

5. In the event of an emergency caused by a riot, fire, or other events at the facility not caused by the Defendants, their agents, employees, successors in office, and those acting in concert with them which make compliance with the terms of this agreement and the policies attached hereto and the partial consent decrees on file herein impossible, it may be necessary to temporarily suspend certain provisions of this agreement and the policies attached hereto and the partial consent decrees on file herein. In such event, the Defendants must formally declare a state of emergency, and, as soon as practical, but no later than five (5) days after such declaration, notify the Plaintiffs and their counsel of the reasons which necessitated the suspension of such suspended provisions. The Defendants will also notify counsel for Plaintiffs of the expected duration of such suspension and the plan of the Defendants to restore said provisions. If the Plaintiffs or their counsel believe those suspensions and/or their duration are unjustified, unreasonable, or taken in bad faith, then they may request appropriate relief from this court.

6. Other than in times of emergency, changed circumstances may, in the future, justify some changes in this agreement and the policies attached hereto and the partial consent decrees on file herein. No change or changes may be made which will lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein. Notice will be given to the lawyers for the Plaintiffs at least thirty (30) days prior to the proposed implementation date. Said notice will contain the proposed change or changes and the reasons therefore. Counsel for the Plaintiffs will ascertain whether, in their opinion, the proposed change

or changes in any way lessen the benefits provided by this agreement or the policies attached hereto and the partial consent decrees on file herein. If so, they will notify Defendants of their objections and the reasons therefore within fifteen (15) days. Efforts will be made to informally resolve the matter. If the dispute cannot be resolved, it will be submitted to the court. The burden will then be on the Defendants to justify that the change or changes should be made and will not lessen the benefits provided by the agreement and the policies attached hereto and the partial consent decrees on file herein before the change or changes will be allowed.

7. Noncompliance with the agreement and the policies attached hereto and the partial consent decrees on file herein shall result in disciplinary action against any non-complying state employee(s). This provision in no way limits remedies otherwise available to the parties to enforce this agreement and the policies attached hereto and the partial consent decrees on file herein.

8. The parties further agree that as of the date of this agreement, the Plaintiff class in *Duran v. Apodaca* shall be defined as "all persons who are now, or in the future may be, incarcerated in the Penitentiary of New Mexico at Santa Fe or at any maximum, close or medium security facility opened for operation by the State of New Mexico after June 12, 1980." All provisions of this agreement will be followed at those institutions except those provisions which are not generally applicable and which are required by unique conditions at the Penitentiary of New Mexico at Santa Fe.

9. The Defendants will appoint a responsible person to report on compliance with the agreement and the policies attached hereto and the partial consent decrees filed herein. Such reports will be sent quarterly to counsel for Plaintiffs.

10. The parties shall submit this agreement to the Court in full settlement of all remaining issues in this

case, except costs and attorney's fees and the parties shall request that the Court retain jurisdiction for such time as the Court deems necessary to enforce compliance with this agreement and the policies attached hereto and the partial consent decrees on file herein.

11. Any modification of the Order of the Court which may be made in the future shall modify this agreement and the policy statements to be consistent with this Order, as so modified.

/s/ Ralph I. Knowles, Jr.
Attorneys for Plaintiffs

/s/ Charles Daniels
Attorneys for Plaintiffs

/s/ Ralph W. Muxlow II
Attorneys for Defendants

/s/ David A. Freedman
Attorneys for Plaintiffs

/s/ Jeff Bingaman
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

JOINT REQUEST FOR PARTIAL CONSENT
DECREE

[Filed Apr. 18, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraph 28 relating to correspondence policies and practices. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. Policy Statement PNM-77-IM-60001.1, 07-27-77, Subject: Correspondence Regulations, will be replaced by the Policy Statement attached to this motion as Exhibit A. The new policy statement will be provided to all prisoners as soon as is practical after this order is entered but in

any event no later than 21 days after the entry of said order.

2. There will be no requirement that prisoners sign a waiver of their right to object to the opening of their mail or to take legal action to assure continuing adherence to constitutional standards in correspondence policies and practices.

3. The defendants will maintain records for at least one year after the signing of this order indicating any documents rejected by the three member Publication Review Panel along with the reasons for the rejection. In addition, the documents rejected will be retained. The described records and documents will be made available to counsel for the plaintiffs to examine at any time upon reasonable notice. In the event counsel for the plaintiffs subsequently determine that the policy statement is being executed in such a manner as to apparently violate constitutional rights of prisoners, they may by appropriate motion with the Court raise the issues presented for a determination by the Court and appropriate relief, if any.

4. If the Court adopts §§ 1, 2 and 3 above then it should also dismiss the allegations of paragraph 28 of the Amended Complaint from the trial of this case except for its retention of jurisdiction to enforce said order.

Submitted by,

/s/ Edwin Macy
For the Plaintiffs

/s/ Ralph W. Muxlow II
For the Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,

Plaintiffs,

vs.

JERRY APODACA, *et al.*,

Defendants.

ORDER

[Filed Apr. 18, 1979]

The parties to the above styled litigation have presented the Court with a Joint Request For Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraph 28 of the Amended Complaint relating to correspondence policies and practices. The Court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any others acting in concert with them, are hereby enjoined from failing to implement fully and within the times prescribed each of the following requirements:

1. Policy Statement PNM-77-IM-60001.1, 07-27-77, Subject: Correspondence Regulations, will be replaced by the Policy Statement attached to this order as Exhibit A. The new policy statement will be provided to all prisoners and will be operational as soon as is practical after this order is entered but in no event later than 21 days after the entry of said order.

2. There will be no requirement that prisoners sign a waiver of their right to object to the opening of their mail or to take legal action to assure continuing adherence to constitutional standards in correspondence policies and practices.

3. Records will be maintained for at least one year after the signing of this order indicating any documents rejected by the three member Publication Review Panel along with the reasons for the rejection. In addition, the documents rejected will be retained. The described records and documents will be made available to counsel for the plaintiffs for examination and copying at any time upon reasonable notice. In the event counsel for the plaintiffs subsequently determine that the policy statement is being executed in such a manner as to apparently violate constitutional rights of prisoners, they may by appropriate motion with the Court raise the issues presented for a determination by the Court as to what relief, if any, should be granted.

4. The allegations of Paragraph 28 of the Amended Complaint relating to correspondence policies and practices are dismissed from the trial of this case. The Court retains jurisdiction to enforce this order.

Done this 18th day of April, 1979.

/s/ Santiago E. Campos
SANTIAGO E. CAMPOS
United States District Judge

POLICY STATEMENT

SUBJECT: CORRESPONDENCE REGULATIONS

1. **POLICY:** It is the policy of this institution to encourage correspondence on a wholesome and constructive level between inmates and members of their families, as well as other friends or associates, with no restrictions except those necessary to insure the safety and security of the institution and other persons.
2. **PURPOSE:** The purpose of this Policy Statement is to outline, in specific terms, the regulations applicable to inmate correspondence.
3. **GENERAL POLICY:** Inmates may correspond with any person and there is no limit upon the number of correspondents an inmate may have. However, correspondence may be rejected by prison officials pursuant to the other rules as stated in this Policy Statement.
4. **MAILING OF LETTERS:** Inmates who are indigent and unable to afford to pay for postage will be provided with a reasonable amount of postage to be supplied regularly by the institution. Postage for legal mail of all inmates will be supplied by the institution.

Outgoing letters for the general population will be deposited in the corridor mail drop across from the inmate dining room exit. Letters, except for those to privileged communicants, will be deposited unsealed. Letters must be written in English or Spanish except when another language of correspondence has been approved, in advance, by the Deputy Warden/Programs. Inmates will not modify institutional stationery in any way and the sender's name,

number and living quarters assignment must appear on all outgoing mail.

5. **INSPECTION OF MAIL:** All outgoing mail from inmates, except for privileged correspondence, will be inspected for contraband.

Outgoing mail will be read if there is reasonable cause to believe that the mail contains escape plans, other plans to commit a crime or to violate institutional rules or regulations, or constitutes a crime in and of itself.

6. **REJECTION OF LETTERS:** All inmates will be held responsible for the contents of their outgoing letters and deliberate violations may result in a misconduct report. Violations of Postal Laws may result in referral for prosecution to Federal authorities.

Rejected mail may be withheld, photocopied and filed for future reference.

When any mail is rejected, the inmate and the correspondent will be notified, in writing, as to the reason for rejection and a copy of the notification will be placed in the inmate's central file.

Rejected mail notifications must receive final signature approval of the Deputy Warden/Programs. Any inmate whose mail is rejected may contest the rejection through the inmate grievance procedure.

Outgoing mail will be rejected when the mail contains contraband, escape plans, other plans to commit a crime, or to violate institutional rules and regulations, or would constitute a crime in and of itself.

Incoming mail will be rejected for the following reasons:

- (a) There is a clear and present danger that the mail will endanger the internal security of

the institution, contains escape plans or other plans involving the prisoner in the commission of a crime, or the violation of institutional rules and regulations, or would constitute a crime in and of itself.

- (b) The mail contains codes or other attempts to circumvent correspondence regulations.
- (c) The material is obscene in that it appeals primarily to the prurient interest or is patently offensive. A three member publication review panel will be established by the warden with the authority to approve or reject materials that are alleged to be obscene. The panel will have the authority and responsibility to review allegedly obscene publications and correspondence to determine whether to reject the documents pursuant to this section.
- (d) Junk mail, pamphlets, leaflets, brochures, etc., will be judged by the same standards as other correspondence. However, any incoming mail not addressed to a prisoner ("occupant"-type addressees) may be discarded at the discretion of prison officials.

7. INCOMING MAIL ENCLOSURES:

Money, in the form of a cashier's check or money order, may be sent to any inmate. Cash or personal checks should not be enclosed.

Photographs will be rejected only pursuant to the same standards and procedures as publications. Photos must be sent in without frames so they can be properly inspected without damage. An inmate may not have a picture of him/herself, alone, for security reasons.

Stamps, personal stationery, and self-addressed stamped envelopes are not permitted.

8. CERTIFIED AND REGISTERED MAIL:

Incoming certified and registered mail for inmates will be processed as all other mail, but delivered to the addresses only upon securing a signed receipt for same.

Outgoing certified and registered mail is permitted if the inmate sender has the funds to pay for such service.

9. PRIVILEGED CORRESPONDENCE:

Outgoing letters to attorneys, the courts, elected governmental officials, the news media, grand juries, law enforcement agents or agencies, the Secretary of Corrections, Corrections Commissioners, and the Parole Board are considered privileged correspondence and will not be opened for inspection.

Letters in this category should be sealed by the inmate and dropped in the special box provided for such letters.

Incoming letters from privileged communicants will not be opened unless the warden or his designee determines that there is reasonable cause to believe that it is counterfeit or contains contraband. When such mail is opened, it will be opened in the presence of the inmate in an appropriate, secure area of the institution by the warden or his designee. The required form will be prepared and the correspondent and the inmate will be notified by the warden or his designee that the mail was opened and the reason for the opening. The notification to the correspondent will be signed by the warden.

10. CORRESPONDENCE WITH THE CLERGY:

Clergy are not considered privileged correspondents.

11. Books and magazines will be accepted and delivered to inmates if they are received directly from the publisher or vendor. Exceptions to this rule to allow receipt of books and magazines from other persons may be made by the warden for reasons of indigence or other good cause. Such exceptions will not be based upon the content of the publication.

12. *INCOMING PACKAGES FOR INMATES:*

Inmates will be allowed to receive packages if they are sent directly from vendors and if the contents are allowed to be retained by inmates and are not available from the canteen, and unless said items cannot reasonably be examined for contraband. Approval for receipt of said packages must be given in advance by the Deputy Warden/Programs pursuant to the provisions of this section. All packages shall be subject to being searched for contraband.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

ORDER

[Filed Aug. 21, 1979]

The parties to the above styled litigation have presented the Court with a Joint Request for Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraphs 27 and 30 of the Amended Complaint insofar as they relate to attorney-prisoner visitation. The court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any other acting on concert with them, are hereby enjoined from failing

to implement fully and within the times prescribed each of the following requirements:

1. The Policy Statement attached to this motion as Exhibit A will replace any and all presently existing policies or practices at the Penitentiary of New Mexico governing visits by attorneys and/or their agents with prisoners incarcerated at the Penitentiary of New Mexico.
2. The new Policy Statement will be provided to all prisoners and put into effect by the defendants as soon as is practical, but in no event later than 21 days, after the entry of said order of this Court.
3. The allegations of Paragraphs 27 and 30 of the Amended Complaint insofar as they relate to attorney-prisoner visitation are dismissed from the trial of this case.
4. The Court retains jurisdiction to enforce this order.

Done this 21st day of August, 1979.

/s/ Santiago E. Campos
SANTIAGO E. CAMPOS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

JOINT REQUEST FOR PARTIAL
CONSENT DECREE

[Filed Aug. 21, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraphs 27 and 30 insofar as they relate to attorney-prisoner *visitation*. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. The Policy Statement attached to this motion as Exhibit A will replace any and all presently existing policies or practices at the Penitentiary of New Mexico governing visits by attorneys and/or their agents with prisoners incarcerated at the Penitentiary of New Mexico.

2. The new Policy Statement will be provided to all prisoners and put into effect by the defendants as soon as is practical, but in no event later than 21 days, after the entry of said order of this Court.

3. If the Court adopts Sections 1 and 2 above, then it should also dismiss the allegations of Paragraphs 27 and 30 of the Amended Complaint insofar as they relate to attorney-prisoner visitation from the trial of this case except for its retention of jurisdiction to enforce said order. -

Submitted by:

/s/ [illegible]
For the Plaintiffs

/s/ Ralph W. Muxlow II
For the Defendants

POLICY STATEMENT

[Filed Aug. 21, 1979]

SUBJECT: ATTORNEY VISITATION

Any inmate has the right to consult with an attorney under reasonable regulations providing for the security of the institution and the safety of the inmate population and staff, as herein stated.

- a. Visits by attorneys (or other appropriate persons acting for an attorney), requested by an inmate, his family, or other persons acting for and on behalf of the inmate, to discuss legal matters, shall be permitted. No inmate or attorney (or other appropriate person) shall be required to reveal the nature and substance of the legal matter to be discussed at said visitation. The PNM reserves the right to utilize appropriate security measures to determine whether or not an appropriate person, other than an attorney, fulfills the requirements of this regulation to meet with a particular inmate. (This class of persons, who are not attorneys, would ordinarily be limited to law students, law clerks, investigators, and the like.) Normally, a written confirmation by an attorney designating an appropriate person to visit for him or her will be sufficient to allow the visit. Hereinafter, the term 'attorney' includes other such appropriate persons, as defined.
- b. If prior to the initial meeting between attorney and inmate, prison officials, for some articulable and justifiable reason, believe that the visit by said attorney was not requested by the inmate, his/her family, or person acting for and on behalf of the inmate, the prison officials may require a showing that the visit was so requested.

Any of the following will be deemed sufficient to make such a showing:

- 1) A written confirmation by the inmate of the request;
- 2) Production of the part of a written document of the inmate making the request for the visit;
- 3) Any other credible information which would establish that the attorney has responded to a request for a visit by the inmate, his or her family, or a person acting for the inmate and on his behalf.
 - c. An attorney shall meet with one inmate at a time, unless it is determined that it would be appropriate for the attorney to meet with more than one inmate at a particular time. This would be appropriate in a situation in which an attorney needs to speak to two or more inmates about the same matter. PNM officials will make the determination as to whether or not it is appropriate for an attorney to meet with more than one inmate at a particular time. The attorney who wants to meet with more than one inmate at a particular time must make an appropriate request to PNM officials and it will be considered by PNM officials on the basis stated herein.
 - d. The Deputy Warden/Programs should be notified by telephone or in writing by any licensed attorney who plans to visit any inmate. This notification should be made by 2:00 p.m. of the work day prior to the visit so that a written clearance memo can be prepared and the interview room reserved accordingly. In the event the visit is denied, the Deputy Warden/Programs will notify the attorney by telephone with an explanation as to the denial.
 - e. Each attorney who plans to visit any inmate under the attorney/client relationship must present bona fide evidence of his license to practice law, such as a state bar membership card and matching identification, such as a driver's license, etc.

f. Attorneys and inmates will make their relationship known on the initial visit by both signing the attached form referred to as 'Form A'. (Form A is solely for PNM's internal use and does not limit an inmate's access to a particular attorney(s). Moreover, Form A does not limit the attorney-client relationship to pending litigation or appeals. The form simply identifies the relationship of attorney and client for record keeping purposes should a question arise concerning a future visit by the attorney).

Form A

The Penitentiary of New Mexico

Santa Fe, New Mexico

LEGAL CONSULTATION FORM

I am requesting the following person or persons consult with me concerning legal matters:

Name of attorney(s) _____

Name of inmate _____

Date —————

I am the attorney whose name appears above:

Signature _____

Address _____

Telephone _____ State of Bar Membership _____

cc. Central File
Deputy Warden File Date _____

g. Regular visitation hours for attorneys are from 8:30 a.m. to 11:30 a.m., 1:00 p.m. to 3:45 p.m. Monday through Friday only. There will be no regularly scheduled attorney visits on legal holidays or weekends because of lack of staff and crowded social visiting conditions. PNM will attempt to facilitate a visit by a licensed attorney at times other than those specified herein, depending on staff and space availability, regardless of whether or not the normal procedures outlined above are followed. Such a visit must be approved in advance by the Deputy Warden/Programs.

h. Prison officials may inspect attorney briefcases, tape recorders, cameras, etc. for contraband. However, prison officials shall not read the contents of any written material contained therein. All inspections of briefcases or other containers of the attorney shall be conducted in the presence of the attorney.

i. Documents sought to be exchanged or retained by the inmate or attorney shall be examined (but not read) by the Chief Classification Officer or the caseworker (or the staff member) for the purpose of inspecting for contraband or other violations of PNM regulations. In the event no contraband or other violation of PNM regulations is present, the document or article shall be allowed to be exchanged or retained by the inmate or attorney. Witnessing or notarizing of an inmate's signature can be arranged by the case manager.

j. The foregoing procedures will be enforced in the absence of a bona fide emergency. PNM will make every reasonable effort to facilitate a visit between any licensed attorney and his inmate-client in the event of a bona fide emergency. Such an emergency must be demonstrated by the inmate or the lawyer to the satisfaction of PNM officials. An emergency visit must be approved in advance by the Deputy Warden/Programs.

k. The officials of the Penitentiary of New Mexico will make these regulations available to inmates and attorneys seeking visitation rights. Said officials may also refuse visitation of attorneys or agents who knowingly fail to comply with them. If prison officials have reason to believe that an attorney has misrepresented his identity or qualifications as an attorney in good standing, or the status of his agent, PNM may refer the matter to the New Mexico Attorney General's Office, and in turn, the matter may be referred by the New Mexico Attorney General's Office to the ethics committee of the New Mexico Bar Association or other appropriate bar association.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,

Plaintiffs,

v.

JERRY APODACA, *et al.*,

Defendants.

JOINT REQUEST FOR PARTIAL CONSENT DECREE

[Filed Dec. 7, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraph 21 *relating to food service* at the Penitentiary of New Mexico (PNM). A number of the conditions which the plaintiffs allege existed at the time this lawsuit was filed and to which some of the provisions of this Partial Consent Decree are addressed are presently corrected. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. The defendants will make arrangements for a qualified dietitian to come to the facility quarterly, examine

the food being served, examine documents showing the food served, and take appropriate actions, as necessary, to determine whether the food being served is nutritionally adequate and sanitary.

2. While at the P.N.M. the above mentioned dietician will meet with food services personnel and one representative of the Inmate Council selected by a vote of the members of the Council to discuss issues concerning the service of food to inmates.

3. A procedure will be established and made available to all inmates which informs them as to how they might gain access to meals in accord with legitimate religious requirements.

4. Provisions will be made to provide adequate diets to persons with legitimate religious requirements which meet those requirements.

5. For Muslims and Jews, the corrections officials will at a minimum:

(A) clearly mark on all menus all foods which contain pork, pork derivatives, pork by-products, or pork seasings;

(B) provide three meals a day to inmates who do not eat pork which are nutritionally adequate and generally similar in nutritional value to the meals provided to inmates who do eat pork;

(C) at one meal a day at which pork, pork derivatives or pork by-products are served as the principal item, the defendants shall provide a substitute item which is similar in nutritional value for inmates who do not eat pork;

(D) thoroughly cleanse the institution's dishware and cutlery so that those items which have come into contact with pork in any way will be free from pork.

6. The defendant corrections officials shall maintain food to be served warm at temperatures of at least 140° F until the food is actually given to the prisoner to eat. Food to be served cold shall be maintained at a temperature of no higher than 45° F until actually served. These standards will be met not only in the cafeteria but also in other places where food is served such as segregation areas.

7. The defendant corrections officials shall maintain a dishwashing temperature of at least 180° F for the washing of all items to be used again by prisoners. A daily log will be kept of temperature readings.

8. The defendant corrections officials shall maintain sneezeguards on the food service line in the cafeteria.

9. The physical structure of the food service, food preparation and food storage areas will be rat and rodent proofed. (E.g., holes and other structural defects allowing the entrance into the area from other locations will be corrected and thereafter properly maintained.) The parties acknowledge that while this provision will assist in keeping rodents out of the food service, it does not provide an absolute guarantee that no rodent will ever enter the area.

10. A program of routine daily housekeeping and an effective roach and rodent extermination program designed to prevent and eradicate roaches and rodents will be carried out.

11. All windows and doors will have effective screens placed on them and maintained so as to prohibit the entry of flies and other animals or insects in the food service and preparation areas. These screens shall be in place by the conclusion of the ongoing Phase II Renovation or May 1, 1980, whichever comes first.

12. Handwashing facilities will be provided in the food service area.

13. No cross connections between the potable water supply and the waste water system will be permitted in the food service area.

14. A garbage grinder or waste disposal system so as to solve problem of waste attracting roaches, rats and other vermin will be operated in the food preparation and service areas.

15. A written preventive maintenance program for the cleaning and maintenance of all food preparation and service equipment will be utilized.

16. A routine daily cleaning program for the food service and preparation areas with specific duties assigned to specific personnel will be utilized.

17. All food service and food preparation personnel (civilian and prisoner) shall comply with local and state health regulations for food handlers.

18. The defendants shall provide clean white outer garments for food service personnel (civilian or prisoner) to wear whenever they come into contact with food.

19. The defendant corrections officials will make good faith efforts to hire the additional two civilian staff members the head of food services indicated he needed in order to be adequately staffed.

20. The defendant corrections officials shall arrange for a semi-annual inspection of the food service and preparation areas by the state fire marshall or other qualified fire safety inspector to insure that these areas meet the requirements of the state fire code and the Life Safety Code, shall maintain on file the results of these inspections and shall provide fire safety equipment over the grills in the food service and preparation areas.

21. The defendant corrections officials shall comply with all New Mexico food service, preparation and protection standards, arrange for at least quarterly inspec-

tions and reports by the state public health office to assure continued consultation and compliance and maintain said reports on file at the facility.

22. Inmates who have medical needs for special diets will be provided with the diet prescribed by the PNM physician or other PNM authorized medical personnel.

Submitted by:

/s/ [Illegible]
For the Plaintiffs

/s/ [Illegible]
For the Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

ORDER

[Filed Dec. 7, 1979]

The parties to the above styled litigation have presented the Court with a Joint Request for Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraphs 30 and 31 of the Amended Complaint insofar as they *relate to inmate legal access*. The court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any other acting in

concert with them, are hereby enjoined from failing to implement fully and within the times prescribed each of the provisions of the attached Joint Request for Partial Consent Decree and the allegations of Paragraphs 30 and 31 of the Amended Complaint insofar as they relate to inmate legal access are dismissed from the trial of this case.

The Court retains jurisdiction to enforce this Order.

Done this 7th day of Dec., 1979.

/s/ Santiago E. Campos
SANTIAGO CAMPOS
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,

Plaintiffs,

v.

JERRY APODACA, *et al.*,

Defendants.

JOINT REQUEST FOR PARTIAL CONSENT
DECREE

[Filed Dec. 7, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraphs 30 and 31 relating to inmate legal access. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

1. The Penitentiary of New Mexico will have available to inmates housed therein two law libraries. The law library which is a part of the general prison library will in the future be utilized by inmates who are not housed in any of the segregation units of the prison.

The library located on the top tier of Cellblock 4 will be utilized by inmates housed in Cellblocks 3 and 4.

2. The general population law library will be open at least six hours a day on Wednesday, Thursday, Friday, Saturday and Sunday. Unless there are fewer custodial staff at the prison than are authorized by the budget, the library will also be open at least 6 hours a day on Monday and Tuesday. The defendants will also make good faith efforts consistent with adequate staff availability to make arrangements so that the library can be opened at night.

3. The Cellblock 4 library shall be open for at least four hours per day Monday through Friday. Normally, inmates housed in Cellblock 4 will utilize the library in the morning and those housed in Cellblock 3 will utilize it in the afternoon. The defendants will make good faith efforts to extend the hours of operation of this library if inmates are making more requests for the use of the library than the time provided will allow. This expansion of the hours of the operation of the library may be contingent upon the availability of a full complement of authorized staff. Inmates housed in segregation units will not be required to forfeit time allotted for recreation in order to use the library.

4. The defendants will assure that all inmates at the Penitentiary of New Mexico have reasonable access to one of the law libraries pursuant only to the notice provisions of ¶ 5 below. Permission to visit either library will not be subject to an approval basis.

5. Inmates desiring to utilize the general library will gain access through notification of their case-manager or other person designated by the prison authorities. Inmates desiring to utilize the Cellblock 4 library will submit a request to the officer in charge of the unit. The inmate requesting to use either library will be given

access at the next available time. In any event, the inmate will be given access to the library within the next two working days. (A working day is a day the library is open.) Additional emergency requests for use of the law libraries will be granted if possible by the Associate Warden for Inmate Management, Deputy Wardens or other designated officials. Access will be on a first-come, first-serve basis and requests will be granted until the capacity limits of the libraries are reached.

6. As in the present practice of officials at the Penitentiary of New Mexico, inmates will not be handcuffed while they are using the law libraries.

7. Job positions as legal assistants will be created in each law library. They will be paid in accordance with the incentive pay program at the penitentiary. They will be given training. There will be a legal assistant on duty during the normal operations of the libraries. Spanish-speaking legal assistants will be available to those Spanish-speaking inmates who cannot adequately understand the English language. Efforts to facilitate utilization of paralegal personnel from civilian sources will be pursued by the defendants.

8. Typewriters in useable condition will be maintained in each library for use in preparing legal documents. In addition to typing paper, carbon paper and onion skin or other suitable paper for extra copies will be made available by the defendants.

9. Forms utilized for filing cases in federal and state courts (e.g., forma pauperis, habeas corpus, civil rights, etc.) will be made available for inmates in both libraries, except when such forms are not available from the courts.

10. At least one tape player will be made available in each library for use by inmates whose trial transcript or other legal matters are on tapes.

11. A copying machine will be made available through the case manager or staff librarian, who will do the copying for the inmates, of documents pertaining to legal matters at a price no higher than the cost to the Penitentiary for making the copies. Provisions will be made to assure that the confidentiality of documents relating to legal matters are preserved.

12. The general population law library will contain at least those books which are listed on Exhibit 1 attached to this document plus all volumes of Federal Supplement and Federal Reporter published since January 1, 1960; Modern Federal Practice Digest and West's Federal Digest 2d; and the relevant volumes of United States Code Annotated including those volumes relating to jurisdiction and procedure, crimes and criminal offenses, civil rights actions and constitutional law.

13. The Cellblock 4 law library will include at least those volumes listed on Exhibit 2 attached to this document.

14. All books or services which provide or require supplementary updating pocket parts of volumes will be kept up to date. If volumes or treatises become outdated, they will be replaced by an up-to-date volume or treatise covering similar subject matters.

15. Inmate access to a notary public will be provided Monday through Friday.

16. The defendants endorse the establishment of, acknowledge the need for and will in good faith seek, a legal services program for inmates at PNM.

17. Inmates who through unnecessary or loud discussion or actions disrupt the orderly operation of either library will be removed. The law libraries will not be utilized for purposes other than legal research or the drafting of documents related to legal matters. Reasonable rules consistent with this order which explains the

procedures for access to, and use of, the libraries will be furnished each inmate. Reinstatement of law library privileges for loss or destruction of property may be contingent upon reimbursement for the value of the lost or destroyed property and the maintenance of proper behavior in the future. Reasonable alternative access to legal resources and/or legal assistance will be provided for those inmates temporarily without access to a law library as a result of a violation of this paragraph.

18. Those actions provided for in paragraphs 1-6 and 8-17 above, which are not dependent upon the completion of the Cellblock 4 library or the arrival of books to be or already ordered, will be implemented as soon as possible but in no event later than 21 days after the entry of the requested order. Paragraph 7 will be implemented no later than December 31, 1979. All other actions provided will be implemented upon completion of the Cellhouse 4 law library, but in any event no later than February 15, 1980.

19. If the Court enters an order as requested concerning the above matters, then it should dismiss the allegations of §§ 30, 31 of the Amended Complaint from the trial of this case except for its retention of jurisdiction to enforce said order.

Submitted by:

/s/ [Illegible]
For the Plaintiffs

/s/ [Illegible]
For the Defendants

EXHIBIT I

PNM Law Library Collection

American Law Reports, 2d & 3d. Quick Index.

American Law Reports, 2d Series.
v.1-90, 1948-1963.

American Law Reports, 3d Series.
v.1- , 1965-

American Law Reports Federal.
v.1- , 1969-

ALR Federal. Quick Index.

Antieau, Chester J. Modern Constitutional Law.
2v. Lawyers Co-Op, 1969.

Bailey, F. Lee. Complete Manual of Criminal Forms,
Federal and State. 2d ed. Lawyers Co-Op, 1974. 2v.

Bailey, F. Lee. Handling Narcotic and Drug Cases.
Lawyers Co-Op, 1972.

Black, Henery C. Black's Law Dictionary. Rev. 4th ed.
West, 1968.

Bundy, Mary Lee. The National Prison Directory.
Urban Information Interpreters, Inc. 1975.

Calmari, John D. The Law of Contracts. West, 1970.

Cleary. McCormick's Handbook of the Law of Evidence.
2d ed. West, 1972.

Cohen, Norris L. Legal Research in a Nutshell. 2d ed.
West, 1971.

Cook, Joseph G. Constitutional Rights of the Accused.
Pre-trial Rights. B-W, 1972.

Corpus Juris Secundum. 101 v. in 117, 1936-

Criminal Law Reporter. 1974-1975: 1977-

Federal Reporter. 2d Series. West. v.1-52, 1924-1931; v. 61-62, 1932-1933.

Federal Reporter. 2d Series. West. (Paper) 477, No. 4, 8/6/73 to date (Many issues missing)

Federal Supplement. West, v. 180- 1960-

Gard, Spenser A. *Jones on Evidence.* 6th ed 1972. 4v.

Hall, Livingston. *Modern Criminal Procedure.* 3d ed. West, 1969.

Israel, Jerald H. *Criminal Procedure in a Nutshell.* West, 1971.

Jailhouse Lawyer's Manual; How to bring a Federal Suit Against Abuses in Prison. San Francisco, Prison Law Collective. 1973. (Xerox copy).

Konvitz, Milton R. *Bill of Rights Reader.* Cornell U. Press, 1968.

Krantz, Sheldon. *Law of Corrections and Prisoner's Rights and Responsibilities.* West, 1973.

LaFave, Wayne R. *Handbook of Criminal Law.* West, 1972.

Legal Problems of Correctional, Mental Health and Juvenile Detention Facilities. Practising Law Institute, 1976.

Lockhart, William B. *Constitutional Law.* ed. West, 1970.

Lowey, Arnold H. *Criminal Law in a Nutshell.* West, 1975.

A Manual on Habeas Corpus for Jail and Prison Inmates. Written and compiled by the Prison Law Project. In cooperation with the Barristers Club of San Francisco. Berkely. Legal Publications, 1973. (Xerox copy)

Martindale-Hubbell Law Directory. Summit, N.J.: Martindale-Hubbell, 1972.

Pacific Reporter, 1884-1930. 300v.

Library has all volumes except: 1, 8, 11, 13, 23, 45, 106, 218, 225, 262, 264, 275.

Pacific Reporter, 2d Series. v. 1-66, and 68-93 (1931-1939).

Pacific Reporter, 2d Series. (Paper) 467, No. 3, 5/22/70 to date. (Many missing issues)

Perkins, Rolland M. *Cases and Materials on Criminal Law and Procedure.* 2d ed. Foundation Press, 1966.

Potts, James L. *Prisoners' Self Help Litigation Manual.* National Prison Project, 1976.

Prosser, William. *Handbook of the Law of Torts.* 4th ed. West, 1971.

Rudovsky, David. *The Rights of Prisoners.* Avon, 1977.

Shepard's Federal Citations.

Shepard's United States Citations.

Sokol, Ronald P. *Federal Habeas Corpus.* 2d ed. Michie, 1969.

Torcia, Charles E. *Wharton's Criminal Procedure.* 12th ed. 4v. 1976.

U.S. Code, 1970 ed. v. 1-11. Supp. IV, v. 1-3 and Index, 1974.

U.S. Code Annotated. West. 188v.

Library has entire set, but only Titles 18; 28 (Sec. 2241-2255); and 42 (Sec. 1981-1985) are being kept up-to-date.

U.S. Supreme Court Digest. West. c. 16, 1952 ONLY.

U.S. Supreme Court Digest, Lawyers Ed. B-W. 20v. in 29.

U.S. Supreme Court Reports, Lawyers Ed. v. 1-100, 1917-1956.

U.S. Supreme Court Reports, LE 2d. v. 1- , 1957-

U.S. Supreme Court Reports, LE 2d. Desk Book.

U.S. Supreme Court Reports, LE 2d. Index to annotations in LE 2d, and ALR Federal, etc. 1972.

U.S. Supreme Court Reports, LE 2d. Later Case Service. 1977.

Werner, O. James. *Manual for Prison Law Libraries.* Rothman, 1976.

Wright, Charles A. *Federal Practice and Procedure.* West, 1969- v. 1-16 and 21.

Krantz, Sheldon. *The Law of Corrections and Prisoners' Rights in a Nutshell.* West, 1976.

U.S. House of Representatives:

 Rules of Criminal Procedure for the U.S. District Court. Oct. 1, 1977.

 Rules of Civil Procedure for the U.S. District Court. Oct. 1, 1977.

 Federal Rules of Appellate Procedure. January 1, 1976.

 Federal Rules of Evidence. February 1, 1978.

The National Ex-Offender Assistance Directory 1978. Contact, Inc.

Federal Rules Decisions. v. 1 to date

New Mexico Materials

New Mexico Digest. West, 6v. in 14.

New Mexico Reports. v. 50- 1946-

New Mexico Statutes Annotated, 1953. 12v. in 20.

New Mexico Statutes Annotated. Special Supplement.
Chapter 14. *Municipal Code*, 1975.

New Mexico Appellate Handbook. Institute of Public
Law & Services.

New Mexico Criminal Law Handbook. Institute of Pub-
lic Law & Services.

New Mexico Local Rules and Federal Rules. Institute of
Public Law & Services.

Roehl, Joseph E. *New Mexico Uniform Jury Instruc-
tions. Civil*. West, 1966.

Shepard's New Mexico Citations.

State Bar of New Mexico Bulletin.

Thompson, Mark B. *New Mexico Appellate Manual*. In-
stitute of Public Law & Services.

Walden, Jerrold L. *Civil Procedure in New Mexico*. In-
stitute of Public Services.

Federal Reporter, 2d Series

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Federal Reporter, 2d Series

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Pacific Reporter, 2d Series

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EXHIBIT II

I. Materials for both Federal and State Prisons

A. Federal Materials

1. *United States Code Annotated*. St. Paul: West
or
United States Code Service (Lawyer's Edition). Rochester: Lawyers Cooperative.
2. *United States Reports*. Washington, D.C.: U.S. Government Printing Office. Vol. 340-, 1950-.
or
Supreme Court Reporter. St. Paul: West. Vol. 71-, 1950-
or
United States Supreme Court Reports (Lawyers' Edition). Rochester: Lawyers Cooperative. Vol. 95-, 1950-.
3. *Federal Reporter*. (2d Series). St. Paul: West. Vol. 179-, 1950-.
4. *Federal Supplement*. St. Paul: West. Vol. 88-, 1950-.
5. *Modern Federal Practice Digest and West's Fed. Digest 2nd*. St. Paul: West, 1960-.
6. *Shepard's United States Citations*. Colorado Springs: Shepard, 1968-.
7. *Shepard's Federal Citations*. Colorado Springs: Shepard, 1969-
8. Wright, Charles A. *Federal Practice and Procedure*. St. Paul: West, 1969.

or

- Orfield, Lester B. *Criminal Procedure Under The Federal Rules*. Rochester, N.Y.: Lawyers Cooperative, 1966-68.
- 9. Sokol, Ronald P. *Federal Habeas Corpus*. (2d ed.) Charlottesville, N.C.: Michie, 1969.

B. General Materials

- 1. Black, Henry C. *Black's Law Dictionary*. (Rev. 4th ed.) St. Paul: West, 1968.

or

Ballentine, James A. *Ballentine's Law Dictionary*. Rochester, N.Y.: Lawyers Cooperative, 1969.

- 2. *Criminal Law Reporter*. Washington, D.C.: Bureau of National Affairs. Weekly. 2 vols. (looseleaf)
- 3. One or more of the following:
 - a. Anderson, Ronald A. *Wharton's Criminal Law and Procedure*. Rochester, N.Y.: Lawyers Cooperative, 1957. (13th ed.)
 - b. Israel, Jerold H. and Wayne R. LaFave, *Criminal Procedure in a Nutshell*. St. Paul: West, 1971.
 - c. Perkins, Rollin M. *Criminal Law*. (3d ed.) Mineola, N.Y.: Foundation Press, 1966.
 - d. LaFave, Wayne R. and Austin Scott, Jr. *Hornbook on Criminal Law*. St. Paul: West, 1972.
 - e. Hall, Livingston, Yale Kamisar, Wayne LaFave and Jerold Israel. *Cases on*

Modern Criminal Procedure, (3rd ed.)
St. Paul: West.

4. Bailey, F. Lee and Henry Rothblatt. *Complete Manual of Criminal Forms, Federal and State*. Rochester, N.Y.: Lawyers Co-operative, 1968.
5. Cohen, Morris L. *Legal Research in a Nutshell*. (2d ed.) St. Paul: West, 1971.
6. Fox, Sanford J. *Juvenile Courts in a Nutshell*. St. Paul: West, 1971.
7. The following:
 - a. *Prison Law Monitor*, Institution Educational Services, 1806 T St., N.W. Washington, D.C. 20009
 - b. *Prisoners' Self-Help Litigation Manual*, Lexington Books, 125 Spring St., Lexington, Mass. 02173
 - c. *Rights of Prisoners*, ACLU, 22 East 40th St., N.Y., N.Y.
8. *Criminal Law Bulletin*. Boston: Warren, Gorham & Lamont. Monthly.

II. Additional Materials for State Prisons

1. Set of annotated statutes of State.
2. State session laws subsequent to coverage in annotated statutes and supplements, if not covered by legislative service of annotated statutes publisher.
3. Court reports of appellate courts of State, 1950-.
4. Digest of court decisions of State.
5. Shepard's citations for State.

6. Rules of State courts not covered in annotated statutes. Single volume edition preferred, if available; otherwise, free copies may be obtained from clerks of some courts.
7. State legal encyclopedia, if any.
8. One or more state practice books (with forms) on evidence, criminal law and procedure.

Note: All materials should be kept up to date by subscriptions or supplementation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,
Plaintiffs,
vs.

JERRY APODACA, *et al.*,
Defendants.

ORDER

[Filed Dec. 7, 1979]

The parties to the above s[ty]led litigation have presented the Court with a Joint Request for Partial Consent Decree which would result in a settlement of the issues raised by the allegations in Paragraph 27 of the Amended Complaint insofar as it relates to visitation at the Penitentiary of New Mexico. The Court has considered the said Joint Request and the terms of the proposed settlement and has determined that the proposed Partial Consent Decree would be in the interest of justice to the parties and should be entered.

Wherefore, premises considered, the defendants, individually and in their official capacities, their agents, employees, successors in office and any other acting in

concert with them, are hereby enjoined from failing to implement fully and within the times prescribed each of the provisions of the attached Joint Request for Partial Consent Decree and the allegations of Paragraph 27 of the Amended Complaint insofar as it relates to visitation is dismissed from the trial of this case.

The Court retains jurisdiction to enforce this Order.

Done this 7th day of December, 1979.

-
/s/ Santiago E. Campos
SANTIAGO CAMPOS
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil Action No. 77-721-C

DWIGHT DURAN, *et al.*,

Plaintiffs,

vs.

JERRY APODACA, *et al.*,

Defendants.

JOINT REQUEST FOR PARTIAL CONSENT
DECREE

[Filed Dec. 7, 1979]

Come now the parties in the above styled case and jointly request that the Court enter a partial consent decree in settlement of those allegations made in the Amended Complaint in paragraph 27 insofar as they *relate to visitation*. The provisions which the parties have agreed to and which this Court is asked to approve and adopt as its order are as follows:

- 1) The number of visitors an inmate may receive and the length of visits may be limited only by the institution's schedule and space and personnel requirements.
- 2) Inmates shall not be denied access to visitation with persons of their choice except where the Chief Executive

Officer or his/her designate can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors.

3) No persons shall be denied permission to visit solely because of their sex, marital status, status as an ex-offender, the fact that they are or have been on another inmate's visiting list or because of the marital status of the inmate.

4) The following provisions limiting who may visit shall be deleted from the defendants' visiting regulations:

A) Ex-felons as visitors:

Persons with known felony convictions, persons with extensive criminal backgrounds, and former PNM inmates will ordinarily not be approved for visiting. Exceptions to this may be extended to immediate family members only, and only with the approval of the Classification Committee. Limited or full visiting privileges may be extended to the persons to be approved when they have shown stability in the community, as may be verified by the field services staff (Probation-Parole Officers), and it has been established that a meaningful relationship exists between the inmates and those persons.

B) Visitors who visit with more than one inmate:

1) Visitation with more than one (1) inmate will only be approved when the visitor(s) is/are immediate family member(s), as defined by paragraph 4b(4), above, or the legal spouse of an approved immediate family member.

2) A person who has been approved for visiting with any inmate will not be approved for visiting with another inmate not related to that visitor. "Related" herein will be defined as "Immediate Family" as defined in this policy statement. If a person has been approved

for visiting with an inmate who is subsequently transferred to any other institution or facility, that person is still ineligible for placement on another inmate's approved visiting list.

C) Common Law Relationships:

(Not to be misconstrued with establishment of common-law relationship for inter-prison visits). The approval of common-law relationships as a basis for visits will be contingent on such factors as the length of the relationship, mutual property holdings, children resulting from the relationship, etc. Visits will not be granted when both parties have lived together for less than one year.

D) Friends of the opposite sex:

Single inmates may have an unlimited number of persons of the opposite sex on his approved visitor list, within the limitations imposed by paragraph C), abcve. Married inmates may have friends and non-blood related relatives of the opposite sex on their visiting list, but only after the inmate's spouse has provided the Visiting Office with written consent for same.

E) Confirmation of marriage:

Anyone claiming to be the legal spouse of a resident incarcerated here must provide a valid marriage certificate; a marriage license is not sufficient unless it also includes a certification that the marriage did in fact take place. Either the marriage certificate or a photocopy may be presented, either by attaching it to the application questionnaire or in person to the Visiting Office when visiting at this facility. If the marriage certificate is presented in person, a photocopy will be made at no cost and the original immediately returned to the owner.

5) Investigations conducted by the defendants relating to visits shall be limited to:

A) Investigations, as required, of incidents involving correspondents and/or visitors which affect or potentially affect the security or orderly operation of PNM.

B) Investigations to verify personal data provided in response to questionnaires in cases in which there is reasonable cause to believe that the information provided is not accurate or complete.

6) Files maintained by the defendants on each visitor shall be limited to:

A) Records of the visitor's certification form (8A) and reports of significant incidents which indicate that visitation by this person will jeopardize the security of the institution and prior convictions of the persons authorized to visit prisoners at the PNM.

B) Files based on daily visiting records obtained from the Front Entrance.

7) Procedures for placement on approved visitor list:

A) The defendants shall issue each new commitment an A&O Visitor Request list form during the initial intake processing. Each resident must complete the form by providing the required information for each visitor being requested in accordance with the instructions provided on the reverse side of the form. The information requested on the form shall be the visitor's name, address, age and the visitor's relationship to the requesting inmate. The completed f[or]m will then be promptly forwarded to the Visiting Office. The forms in Spanish will be provided on request.

B) Residents returning as parole violators and those returning on subsequent sentences shall be required to submit a new A&O Visitor Request List. Prior authorizations for prisoners returning from other facilities such as on minimum security visiting lists will be reviewed upon transfer. A new list need not be submitted to resume visits.

C) The Visiting Office will send a questionnaire application form (Class. form 8A) to each person, regardless of age or relationship, that a resident requests to be authorized for visiting priv[i]leges. The questionnaire will be accompanied by a summary of the visiting regulations.

D) As a general rule, the parents, grandparents, siblings, legal wife, and children of residents and others with existing relationships as approved by the visiting officer will be granted 30-day temporary approval to visit, provided their individual names have appeared on the resident's A&O Visitor Request List. They must, however, complete and return the questionnaire application form (Class. form 8A) within the thirty day time period. Failure to do so will cause their temporary visiting authorization to be suspended until their questionnaire application is received, processed and approved by the Visiting Office. The fact that a person was previously granted a temporary visiting authorization does not necessarily mean they will be granted permanent visiting privileges. All other applicants, including other relatives, may not visit until their applications have been received, processed, and approved, and approval notices issued.

E) The defendants will review all questionnaires returned by applicants to insure completeness and validity of the information provided. Questionnaires not properly completed will be returned for correction, as necessary.

8) The following provisions shall govern the time and the number of hours per week prisoners will be permitted to visit:

A) Hours for social visiting are from 8:30 a.m. to 3:30 p.m. from Wednesday through Sunday, with no visiting normally on Mondays or Tuesdays, except when

they are designated as state holidays. The official visiting week is Wednesday-Sunday.

B) Due to present space and staff limitations, all inmates in the general population may normally visit for four (4) hours per week. Visits taking place on Saturday, Sunday or a state holiday may be limited to one two (2) hour weekly visit if allowing for the usual two separate two (2) hour weekly visits would result in some prisoners not being allowed to have visitation time on the weekend. Due to overcrowding in the visiting room visits may during peak visiting times be limited to one hour if allowing the usual two(2) hour visit would result in some prisoners with visitors waiting not be allowed to have visitation. Visitors may divide the four (4) hours of visits into two (2) separate weekly visits of no more than two (2) hours in duration.

C) Inmates in level #2, Segregation Unit—visitation for these prisoners shall be governed by a separate policy statement.

D) Inmates in level #3, long-term segregation—visitation for these prisoners shall be governed by a separate policy statement.

E) Inmates in CB #4, Protection status—visitation for these prisoners shall be governed by a separate policy statement.

F) Visiting on holidays will be counted as a regular visiting day. When a legal state holiday falls on either a Monday or a Tuesday, the visiting week will be Monday or Tuesday through Sunday.

G) Any extra visiting time must be recommended in writing, in advance, by the Casemanager with final approval by the Chief Classification Officer. Because of space limitations, extra visiting time on weekends and holidays should be discouraged. Under special circum-

stances, a visit may be longer in duration or occur at a time different from that described above, e.g., if a visitor must travel a long distance or is unable to visit on normal visiting days.

H) Visiting hours are not cumulative from week to week. Any portion of one hour of visiting time used will be charged as a full hour except when the visit is terminated by staff for some institutional function over which the inmate has no control, e.g., Parole Board appearances. In that case, the inmate will be entitled to the remainder of his visiting time, provided it can be accomplished in the same visiting week during which the interruption occurred.

I) Inmates officially assigned to the Annex or Cell Block #1, Honor Unit, are allotted four (4) hours visiting time on week days (Wednesday-Friday). This time may be divided into two (2) separate two (2) hour visits provided the time is used on week days. Visits of less than two (2) hour duration will count as a two (2) hour visit. An additional two (2) hours visiting time is allotted for weekends. Annex-assigned inmates may conduct weekday (i.e., Wednesday, Thursday, Friday) visits in the designated outside area. Visitors must register and undergo thorough security screening at the Front Entrance Building prior to reporting to the Annex to visit. All restrictions imposed upon regular social visits at the Main Institution as stipulated within the Policy Statement will be enforced.

9) Prisoners may have up to but no more than three visitors at one time because of space limitations. When more than three approved visitors wish to visit during the same period, they may alternate so that no more than three visitors are visiting at one during the regular visiting period. The number of visitors per inmate may be reduced without prior notice if overcrowding or other situations which pose a threat to the security of the institution, exist.

10) The following age limitations shall apply to visitors:

A) No visitors under the age of eighteen (18) years will be permitted to enter the Penitentiary for visiting purposes unless accompanied at all times by an adult approved for visiting the same inmate.

B) Brothers, sisters, children and grandchildren over the age of sixteen (16) may be approved for visiting privileges and may visit unaccompanied by an adult.

C) Children under 5 years of age will not be charged against the number of visitors (3) allowed to visit at one time. They must, however, be kept under reasonable control in both the visiting room and waiting areas. Nuisance created by children and/or adults will be sufficient reason to terminate a visit.

11) The following provisions shall govern the conduct of visits and searches of visitors:

A) It is a violation of state law for any person to introduce, or attempt to introduce, into the penitentiary any article of contraband including deadly, explosive materials, currency, weapons, ammunition, intoxicants or controlled substance. All visitors will be questioned by the defendants prior to their admittance into the fenced perimeter to determine whether they possess any of the above prohibited items. All persons entering the PNM will be required to pass through a metal detector.

B) Purses, briefcases, packages, etc., must be locked in the visitors' automobiles prior to entering the institution. Vehicles containing contraband other than weapons, alcohol, or drugs will be allowed to park in visitor's parking area after locking such items in trunk. Vehicles containing alcohol or drugs will be allowed to park in the visitors parking lot after disposing of the alcohol or drugs.

C) All packages and items carried into the institution are subject to search by PNM employees and/or state and county law-enforcement officials.

D) All visitors shall be informed prior to entering the institution that, upon reasonable cause, they may be subject to search and must sign a statement to that effect. If they choose not to enter, they will not be subjected to a search, and will be escorted from institutional grounds immediately. Where there exists a reasonable suspicion that a particular visitor is attempting to introduce contraband into the institution, the Chief Executive Officer on duty at the facility may order at any time that the visitor be subjected to a more thorough search. A visitor may be requested to remove his/her clothing to submit to a strip search only where the Chief Executive Officer of the PNM determines that there is probable cause to believe that the particular visitor possesses contraband. In such an instance the search may be conducted only by an employee of the PNM of the same sex as the visitor in an area that provides the visitor the greatest possible privacy.

E) Visitors and inmates may kiss and embrace at the beginning and at the end of each visiting period, but other physical displays of affection which are disruptive to the visiting environment will not be permitted. Inmates will be permitted to hold infant children during visits and may assist with feeding.

F) Written messages, after inspection and approval by visiting room officer, and photographs, may be exchanged during a visit. Visiting room tables are to be kept clear of all items, such as cigarettes, lighters, matches, wallets, etc.

G) Money may not be left for an inmate but may be mailed to the institution in the form of a cashier's check or money order from approved visitors.

12) The following rule will govern the search of prisoners having visits:

Inmates having visits at any time will submit to complete strip shakedowns before and after each visit.

The Lieutenant-in-charge will insure that each inmate is given a complete shakedown as indicated. The search will be conducted by a male employee of the PNM in an area which provides the greatest possible privacy to the inmate. Where there is a reasonable suspicion that the prisoner possesses contraband, the search may involve a visual inspection of the prisoner's body cavities (rectal and/or vaginal inspection) conducted by medical personnel. A prisoner may be subjected to a manual or instrument inspection of his body cavities only where there is probable cause to believe he is concealing contraband. Reasonable suspicion is not created by the mere fact of a contact visit. In such cases the search must be authorized by the Chief Executive Officer of the facility and conducted by a medically trained person.

13) Each resident may have up to a maximum of fifteen (15) approved visitors regardless of their relationship, providing they have been cleared by the Visiting Office. The Warden may authorize an increase in the list, under special circumstances such as in cases where the prisoner's immediate family exceeds fifteen (15).

14) Approval of persons on an inmate's visiting list while at any other correctional institution or facility will be reviewed upon the inmate's transfer back to the Penitentiary of New Mexico. The defendants will update the approved visiting list upon the inmate's return to PNM and will assure that policy has been followed and determine any change in circumstances.

15) Inter Prison visits:

A) Inter-prison visits will be allowed for members of the immediate family. Visiting time will not be charged against the inmate's allocated time for visiting.

B) Establishment of relationship:

1. If legally married, the Certificate of Marriage must be produced at the time of application for visiting privileges.

2. In the case of a common-law relationship, the applicant will provide evidence that they have cohabited for a period prior to incarceration, or a child or children resulted from their relationship. All materials are to become a permanent part of the central files of both inmates.

C) Restriction of Inter-prison visiting privileges:

1. If either inmate is at any time placed in disciplinary or segregation status, inter-prison visiting privileges for both inmates shall be immediately suspended and remain suspended until release of the disciplinary segregated inmate.

2. Any breach of rules while visiting, e.g., refusing to obey an order or creating a disturbance, may result in termination of visiting privileges.

3. A written memorandum will be forwarded to the Deputy Warden/Programs on any person denied, suspended or terminated from receiving visiting privileges at the Penitentiary of New Mexico. The report will include reasons for the denial, name of inmate and visitor involved, and employee approving suspension or termination of visiting privileges is delegated to the designated Duty Officer on weekends and holidays, and the Deputy Warden/Programs or his designee during normal working hours.

D) Inter-prison visits between immediate family members:

Inter-prison visiting between immediate family members may be approved if it is shown that immediate family ties exist between or among those requesting to visit with each other. Initial approval for these visits must be obtained from the Visiting Officer and the Classification Committee.

E) Visiting after release:

Inmates who have visited previously on this basis will be allowed to continue visiting after one of them has been released, provided there are no indications that visiting should be discontinued.

F) Conduct during inter-prison visits:

All visiting rules and regulations applicable to social visiting will also apply in this category of visiting.

16) Visits with members of the clergy:

Members of the clergy who wish to make one or more visits with an inmate on a professional basis must make a written request prior to the initial visit, to the Warden, a prompt response will be given. Such visiting will not be counted against the inmate's visiting hours. Any member of the clergy who wishes to visit regularly as a friend rather than in his official capacity must make application to be placed on the inmate's regular visiting list as a friend or relative, as appropriate.

17) Prison hospital visits:

The Hospital Administrator, in conjunction with the Visiting Officer, will determine whether a hospitalized inmate may have a visit and whether the visit should take place in the regular visiting room or in the hospital. If the visit is to be held in the hospital, the Deputy Warden/Programs must grant prior approval. If approved, the Superintendent of Correctional Security will provide officer escort for the visitor and officer supervision.

18) Special visits:

All special visits not covered in this policy statement, e.g., with prospective employers, law enforcement officers, etc. must be approved in advance, in writing, by the Deputy Warden/Programs, subject to review by the Warden.

Immediate family members who reside out of state and who seldom visit do not necessarily have to be placed on the regular visiting list; they may visit under this regulation.

19) Visitor identification:

All visitors sixteen (16) years of age and older must present bona fide identification bearing their photograph before being permitted to enter the Penitentiary.

20) Overcrowded visiting room:

The ranking shift supervisor or the Duty Officer may alleviate crowded conditions in the Visiting Room by abbreviating two-hour visits to one-hour visits, being careful to credit the concerned inmate with the time not used.

21) Visitors' register:

Each approved visitor must sign a register upon entering and exiting the institution.

22) Pursuant to this Partial Consent Decree the defendants agree to issue the attached policy statement. Modifications of the provisions of the policy statement not explicitly included in the provisions of the Consent Decree may be made by the defendants without the permission of the Court as necessary for the security and orderly operation of the PNM.

23) The provisions of this order shall become effective February 1, 1980.

Submitted by:

/s/ [Illegible] /s/ [Illegible]
For the Plaintiffs For the Defendants

CORRECTIONS DIVISION

POLICY: VISITING

1. *POLICY:* It is the policy of this Institution to provide an effective visiting program that will enhance rehabilitative efforts, establish a reasonable normalization of social relationships, and satisfies security requirements of this facility. Policy and Procedure is updated annually.
2. *PURPOSE:* To establish regulatory procedures and guidelines for administering the visiting program.
3. *GENERAL:*
 - a. Family ties and personal relationships are important factors in individual and group morale. Visits are part of the means for maintaining family ties and wholesome personal relationships with relatives and friends.
 - b. The supervision of visits will be handled in a manner to insure contribution to good public relations, develop the public's understanding of institutional programs, and assist in the positive development of individual treatment programs and planning.
 - c. The number of visitors an inmate may receive and the length of visits may be limited only by the institution's schedule and space and personnel requirements. Inmates shall not be denied access to visitation with persons of their choice except where the Chief Executive Officer or his/her designate can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors.

4. **VISITING OFFICE:**

- a. Responsibilities: The Visiting Office (V) is designated as the office of primary responsibility for all matters relating to visiting and has the following specific duties:
 - (1) To serve as the focal point for inquiries, assistance, and information.
 - (2) To approve and disapprove applications in accordance with the procedures established herein.
 - (3) To conduct investigations, as required, of incidents involving correspondents and/or visitors which affect or potentially affect the security or orderly operation of PNM.
 - (4) To maintain records of the visitor's verification form (8A) and reports of significant incidents which indicate that visitation by this person will jeopardize the security of the institution and prior convictions of the persons authorized to visit prisoners at the PNM.
 - (5) To inform the Front Entrance Officer and the Mail Room of persons authorized to visit residents in PNM, as well as any changes in their status.
 - (6) To maintain files based on daily visiting records obtained from the Front Entrance.
 - (7) To establish a secure area for the storage of investigative and intelligence information with access strictly limited, in accordance with applicable State and Federal laws, to:
 - (a) The Warden
 - (b) The Deputy Warden/Programs

- (c) The Superintendent of Correctional Security
- (d) The Intelligence Officer
- (e) The Chief of Classification and Programming
- (f) Personnel assigned to the Visiting Office

(8) To conduct investigations to verify personal data provided in response to questionnaires in cases in which there is reasonable cause to believe that the information provided is not accurate or complete.

(9) To work closely with the Intelligence Office on any matter affecting the security or orderly operation of the Penitentiary which involves correspondents or visitors.

b. *Procedures:*

- (1) The Identification Office shall issue each new commitment an A&O Visitor Request list form during the initial intake processing. Each resident must complete the form by providing the required information for each visitor being requested in accordance with the instructions provided on the reverse side of the form. The information requested on the form shall be the visitor's name, address, age and the visitor's relationship to the requesting inmate. The completed form will then be promptly forwarded to the Visiting Office. The forms in Spanish will be provided on request.
- (2) Residents returning as parole violators and those returning on subsequent sentences shall be required to submit a new A&O Visitor Request list. Prior authorizations for prisoners returning from other facilities such as on

minimum security visiting lists will be reviewed upon transfer. A new list need not be submitted to resume visits.

- (3) The Visiting Office will send a questionnaire application form (Class. form 8a) to each person, regardless of age or relationship, that a resident requests to be authorized for visiting privileges. The questionnaire will be accompanied by a summary of the visiting regulations informing visitors of procedures.
- (4) As a general rule, the parents, grandparents, siblings, legal wife, and children of residents and others with existing relationships as approved by the casemanager will be granted 30-day temporary approval to visit, provided their individual names have appeared on the resident's A&O Visitor Request List. They must, however, complete and return the questionnaire application form (Class. Form 8a) within the thirty day time period. Failure to do so will cause their temporary visiting authorization to be suspended until their questionnaire application is received, processed and approved by the Visiting Office. The fact that a person was previously granted a temporary visiting authorization does not necessarily mean they will be granted permanent visiting privileges. All other applicants, including other relatives, may not visit until their applications have been received, processed, and approved, and approval notices issued.
- (5) The Visitation Officer will review all questionnaires returned by applicants to insure completeness and validity of the information provided. Questionnaires not properly completed will be returned for correction, as necessary.

5. **BASIC POLICY:** The number of visitors an inmate may receive and the length of visits may be limited only by the institution's schedule and space and personnel requirements. Inmates shall not be denied access to visitation with persons of their choice except where the Chief Executive Officer or his/her designate can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors. No persons shall be denied permission to visit solely because of their sex, marital status, status as an ex-offender, the fact that they are or have been on another inmate's visiting list or because of the marital status of the inmate.

a. *Hours:*

(1) Hours for social visiting are from 8:30 a.m. to 3:30 p.m. from Wednesday through Sunday, with no visiting normally on Mondays or Tuesdays, except when they are designated as state holidays.

The official visiting week is Wednesday-Sunday.

(2) Due to present space and staff limitations, all inmates in the general population may normally visit for four (4) hours per week. Visits taking place on Saturday, Sunday or a state holiday may be limited to one two (2) hour weekly visit if allowing for the usual two separate two (2) hour weekly visits would result in some prisoners not being allowed to have visitation time on the weekend. Due to overcrowding in the visiting room visits may during peak visiting times be limited to one hour if allowing the usual two (2) hour visit would result in some prisoners with visitors waiting not being allowed to have visitation. Visitors may divide the four (4) hours of visits into two (2) separate weekly visits of no more than two (2) hours in duration.

- (3) *Inmates in level #2, Segregation Unit*—visitation for these prisoners shall be governed by a separate policy statement.
- (4) *Inmates in level #3, long-term Segregation*—visitation for these prisoners shall be governed by a separate policy statement.
- (5) *Inmates in CB#4, Protection Status*—visitation for these prisoners shall be governed by a separate policy statement.
- (6) Visiting on holidays will be counted as a regular visiting day. When a legal state holiday falls on either a Monday or a Tuesday, the visiting week will be Monday or Tuesday through Sunday.
- (7) Any extra visiting time must be recommended in writing, in advance, by the Casemanager with final approval by the Chief Classification Officer. Because of space limitations, extra visiting time on weekends and holidays should be discouraged. Under special circumstances, a visit may be longer in duration or occur at a time different from that described above, e.g., if a visitor must travel a long distance or is unable to visit on normal visiting days.
- (8) Visiting hours are not cumulative from week to week. Any portion of one hour of visiting time used will be charged as a full hour except when the visit is terminated by staff for some institutional function over which the inmate has no control, e.g., Parole Board appearances. In that case, the inmate will be entitled to the remainder of his visiting time, provided it can be accomplished in the same visiting week during which the interruption occurred.
- (9) *Inmates officially assigned to the Annex or Cell Block #1, Honor Unit*, are allotted four

(4) hours visiting time on week days (Wednesday-Friday). This time may be divided into two (2) separate two (2) hour visits provided the time is used on week days. Visits of less than two (2) hour duration will count as a two (2) hour visit. An additional two (2) hours visiting time is allotted for weekends. Annex-assigned inmates may conduct weekday (i.e., Wednesday, Thursday, Friday) visits in the designated outside area. Visitors must register and undergo thorough security screening at the Front Entrance Building prior to reporting to the Annex to visit. All restrictions imposed upon regular social visits at the Main Institution as stipulated within the Policy Statement will be enforced.

b. *Number of Visitors:*

No more than three persons may visit an inmate at one time because of space limitations. When more than three approved visitors wish to visit during the same period, they may alternate so that no more than three visitors are visiting at one time during the regular visiting period. The number of visitors per inmate may be reduced without prior notice if overcrowding or other situations which pose a threat to the security of the institution, exist.

c. *Visitors (Underage):*

No visitors under the age of eighteen (18) years will be permitted to enter the Penitentiary for visiting purposes unless accompanied at all times by an adult approved for visiting the same inmate. Brothers, sisters, children and grandchildren over the age of sixteen

(16) may be approved for visiting privileges and may visit unaccompanied by an adult. Children under 5 years of age will not be charged against the number of visitors (3) allowed to visit at one time. They must, however, be kept under reasonable control in both the visiting room and waiting areas. Nuisance created by children and/or adults will be sufficient reason to terminate a visit.

d. *Conduct during Visiting:*

Visitors and inmates may kiss and embrace at the beginning and at the end of each visiting period, but other physical displays of affection which are disruptive to the visiting environment will not be permitted. Inmates will be permitted to hold infant children during visits and may assist with feeding.

e. *Visitors' Responsibilities:*

- (1) Purses, briefcases, packages, etc., must be locked in the visitors' automobiles prior to entering the institution. Vehicles containing contraband other than weapons, alcohol or drugs will be allowed to park in visitors' parking area after locking such items in trunk. Vehicles containing alcohol or drugs will be allowed to park in the visitors' parking area after disposing of the alcohol or drugs.
- (2) Written messages, after inspection and approval by visiting room officer, and photographs, may be exchanged during a visit. Visiting room tables are to be kept clear of all items, such as cigarettes, lighters, matches, wallets, etc.
- (3) Smoking is not permitted by either inmates or visitors in either the social visiting room or

special interview rooms. Smoking is permitted by visitors in the visitors' waiting areas.

- (4) The vending machines in the visitors' waiting room and front lobby area are for the use of visitors, but all items purchased must be consumed and/or disposed of prior to entering the visiting room.
- (5) Money may not be left for an inmate but may be mailed to the institution in the form of a cashier's check or money order from approved visitors.
- (6) It is a violation of state law for any person to introduce, or attempt to introduce, into the penitentiary any article of contraband including deadly, explosive materials, currency, weapons, ammunition, intoxicants or controlled substance. All visitors will be questioned by the Entrance Building Officer prior to their admittance into the fenced perimeter to determine whether they possess any of the above prohibited items. All persons entering the PNM will be required to pass through a metal detector.
- (7) All packages and items carried into the institution are subject to search by PNM employees and/or state and county law-enforcement officials.
- (8) All visitors shall be informed prior to entering the institution that, upon reasonable cause, they may be subject to search and must sign a statement to that effect. If they choose not to enter, they will not be subjected to a search, and will be escorted from institutional grounds immediately. Where there exists a reasonable suspicion that a particular visitor is attempt-

ing to introduce contraband into the institution, the Chief Executive Officer on duty at the facility may order at any time that the visitor be subjected to a more thorough search. A visitor may be requested to remove his/her clothing to submit to a strip search only where the Chief Executive Officer of the PNM determines that there is probable cause to believe that the particular visitor possesses contraband. In such an instance the search may be conducted only by an employee of the PNM of the same sex as the visitor in an area that provides the visitor the greatest possible privacy.

f. *Inmates' Responsibilities:*

Inmates having visits at any time will submit to complete strip shakedowns before and after each visit. The Lieutenant-in-charge will insure that each inmate is given a complete shakedown as indicated. The search will be conducted by a male employee of the PNM in an area which provides the greatest possible privacy to the inmate. Where there is reasonable suspicion that the prisoner possesses contraband, the search may involve a visual inspection of the prisoner's body cavities (rectal and/or vaginal inspection) conducted by medical personnel. A prisoner may be subjected to a manual or instrument inspection of his body cavities only where there is probable cause to believe he is concealing contraband. Reasonable suspicion is not created by the mere fact of a contact visit. In such cases the search must be authorized by the Chief Executive Officer of the facility and conducted by a medically trained person.

g. Number of Approved Visitors Per Resident:

Each resident may have up to a maximum of fifteen (15) approved visitors regardless of their relationship, providing they have been cleared by the Visiting Office. The Warden may authorize an increase in the list, under special circumstances such as in cases where the prisoner's immediate family exceeds fifteen (15).

h. Validation of Inmates Returning from Another Facility:

Approval of persons on an inmate's visiting list while at any other correctional institution or facility will be reviewed upon the inmate's transfer back to the Penitentiary of New Mexico. The Visiting Officer will update the approved visiting list upon the inmate's return to PNM and will assure that policy has been followed and determine any change in circumstances.

i. Other Visits:

Inter-prison Visits: (ANNEX)

(a) Inter-prison visits will be allowed for members of the immediate family. Visiting time will not be charged against the inmate's allocated time for visiting.

(b) *Establishment of Relationship:*

1. If legally married, the Certificate of Marriage must be produced at the time of application for visiting privileges.
2. In the case of a common-law relationship, the applicant will provide evi-

dence that they have cohabited for a period prior to incarceration, or a child or children resulted from their relationship. All materials are to become a permanent part of the central files of both inmates.

(c) *Restriction of Inter-Prison Visiting Privileges:*

1. If either inmate is at any time placed in disciplinary or segregation status, inter-prison visiting privileges for both inmates shall be immediately suspended and remain suspended until release of the disciplinary segregated inmate.
2. Any breach of rules while visiting, e.g., refusing to obey an order or creating a disturbance, may result in termination of visiting pr[i]vileges.
3. A written memorandum will be forwarded to the Deputy Warden/Programs on any person denied, suspended or terminated from receiving visiting privileges at the Penitentiary of New Mexico. The report will include reasons for the denial, name of inmate and visitor involved, and employee approving suspension or termination of visiting privileges is delegated to the designated Duty Officer on weekends and holidays, and the Deputy Warden/Programs or his designee during normal working hours.

(d) *Inter-prison visits between immediate family members:*

Inter-prison visiting between immediate family members may be approved if it is shown that immediate family ties exist between or among those requesting to visit with each other. Initial approval for these visits must be obtained from the Visiting Officer and the Classification Committee.

(e) *Visiting after Release:*

Inmates who have visited previously on this basis will be allowed to continue visiting after one of them has been released, provided there are no indications that visiting should be discontinued.

(f) *Conduct During Inter-Prison Visits:*

All visiting rules and regulations applicable to social visiting will also apply in this category of visiting.

(2) *Visits with Members of the Clergy:*

Members of the clergy who wish to make one or more visits with an inmate on a professional basis must make a written request prior to the initial visit, to the Warden, a prompt response will be given. Such visiting will not be counted against the inmate's visiting hours. Any member of the clergy who wishes to visit regularly as a friend rather than in his official capacity must make application to be placed on the inmate's regular visiting list as a friend or relative, as appropriate.

(3) *Prison Hospital Visits:*

The Hospital Administrator, in conjunction with the Visiting Officer, will determine

whether a hospitalized inmate may have a visit and whether the visit should take place in the regular visiting room or in the hospital. If the visit is to be held in the hospital, the Deputy Warden/Programs must grant prior approval. If approved, the Superintendent of Correctional Security will provide officer escort for the visitor and officer supervision.

(4) *Special Visits:*

All special visits not covered in this policy statement, e.g., with prospective employers, law enforcement officers, etc. must be approved in advance, in writing, by the Deputy Warden/Programs, subject to review by the Warden.

Immediate family members who reside out of state and who seldom visit do not necessarily have to be placed on the regular visiting list; they may visit under this regulation.

j. *Visitor Identification:*

All visitors sixteen (16) years of age and older must present bona fide identification bearing their photograph before being permitted to enter the Penitentiary.

k. *Overcrowded Visiting Room:*

The ranking shift supervisor or the Duty Officer may alleviate crowded conditions in the Visiting Room by abbreviating two-hour visits to one-hour visits, being careful to credit the concerned inmate with the time not used.

l. *Visitors' Register:*

Each approved visitor must sign a register upon entering and exiting the institution.

6. DUTY CASE MANAGER AND DUTY OFFICER ASSISTANCE:

Whenever assistance is needed with visiting problems which might arise, the Visiting Officer and/or the assigned Case Manager will be contacted for help. During weekends and holidays, the Duty Case Manager will be contacted for assistance. If the Duty Case Manager cannot assist the officers in charge of visiting, he will contact the Staff Duty Officer for additional assistance and decision making. The Duty Case Manager will make frequent contact with the visiting officer during weekends and holidays.

7. CIRCUMVENTING OF REGULATIONS:

Any attempt to circumvent the regulations outlined in this policy statement may result in loss of visiting privileges and possible further action against the inmate and/or visitors pursuant to laws of the State of New Mexico and the Inmate Disciplinary Code (Corrections Division, State of New Mexico).

8. INTERPRETATION AND CHANGES:

Modifications of the provisions of this policy, not included in the consent decree, entered into in *Duran v. Apodaca, et al.*, may be made at any time, as necessary for the proper security and orderly operation of the institution.

M. Jerry Griffin, Warden

POLICY STATEMENT**EXHIBIT A****SUBJECT: CLASSIFICATION**

1. The Intake and Classification Center (ICC) has the overall responsibility to classify, test and monitor all inmates committed to the Department of Corrections and to develop data for Department planning and budget.
2. The policies and procedures which govern the actions of the ICC will be written and, at least annually, reviewed. Relevant policies and procedures, including a description of criteria for programs and general classification will be made available to all inmates and employees as part of their orientation. The classification manual will contain all classification policies and procedures for implementing those policies. The manual will be made available to all staff and will be updated as needed, but at least annually.
3. Custody classification will be guided by rational, objective standards derived from behavioral criteria. Inmates will not be disqualified from any custody classification solely by virtue of arbitrary and rigid criteria such as detainers, consecutive sentences, etc. Classification will be based on an evaluation of the accumulation of identified, relevant and rational factors and standards. Methods of continuing validation of those factors and standards will be developed and implemented. No classification change shall be based solely on a finding of fact by the disciplinary committee of a disciplinary infraction, but all changes must be based upon a consideration of the inmate's entire record under the standards and criteria adopted pursuant to this agreement.
4. No inmate shall be classified under a more restrictive security designation than is required by legitimate security requirements.
5. No inmate shall be subjected to more restrictive conditions of confinement, including but not limited to

freedom of movement within the institution and out-of-cell time, than those justified by the inmate's security designation. However, the Department of Corrections will use its best efforts to insure that no inmate be housed for more than 30 days in facilities designed or designated to house persons under restrictions and/or security more secure or stringent than that determined to be needed for the inmate by the rational classification system. In the event that an inmate is housed for more than 30 days in such a facility, he/she will be housed under conditions of confinement within that institution which are substantially similar to those justified by the inmate's security designation.

6. Jobs, program assignments, housing and services will be distributed in a rational, fair and equitable manner.

7. Each inmate's educational, vocational, medical and psychological needs shall be identified and the needed programs shall be made available to inmates consistent with the provisions in *Duran v. Apodaca*.

8. Provision will be made for appropriate programs and services for inmates with special needs, e.g., inmates who are drug addicts, drug abusers, alcoholics, emotionally disturbed, mentally retarded, or who pose high risks or require special protection. Regular data will be collected and maintained on such populations and programs. Services will be adapted as needed.

9. During intake and classification, the inmate will be provided services and resources comparable to those available to the general population, including correspondence, visitation, recreation, social activities and religious services.

10. All classification decisions provided for in this agreement will be made by classification committees. Each institutional classification committee will consist of

three persons, including a member of the psychological staff, a member of the program staff and a representative of the correctional security staff. The ICC classification committee will be composed of appropriate professional staff.

11. Inmates will be allowed maximum involvement in the classification process, which will include an opportunity to know the reasons for their classification and an opportunity to respond in person. Inmates will be carefully screened upon their commitment to the Department and will be regularly evaluated thereafter. Inmates will participate in assessing their needs and in selecting programs to meet those needs. Classification decisions will not be based upon confidential information which inmates have no reasonable opportunity to rebut.

12. The classification (custody and program) of each inmate who is serving a sentence of less than five years will be reviewed at least every ninety (90) days. The classification of inmates serving sentences of five years or longer will be reviewed at least annually. Reviews will be based on behavioral observations and analysis over a reasonable time period. Rational criteria and procedures consistent with the other general principles in this agreement will be developed and implemented. Inmates will also be allowed to initiate reviews of their progress, status and programming.

13. Inmates may not be required to participate in programs with the exception of work assignments.

14. Interviews with inmates in the classification or reclassification process shall be conducted in places that afford privacy from other inmates or irrelevant staff.

15. The defendants, with assistance from qualified consultants from the National Institute of Corrections, will develop a draft plan within 45 days of the implementation of this policy statement to meet the terms of this policy statement. Said plan will include criteria

for classification and reclassification, including standards for the utilization of personality inventory testing, personnel, resources and equipment needed, and timetables for implementation of the plan within a reasonable period of time. The draft plan will be circulated to counsel for the parties who may make comments or objections within 10 days. Within 70 days of the signing of the date of implementation of this policy statement a final plan will be submitted to the Court and the parties and will be implemented by the defendants within the time limits established by the plan. If the Plaintiffs are not satisfied that the plan will bring the Defendants into compliance with this policy statement within a reasonable period of time, they may apply to the Court for further relief.

POLICY STATEMENT**EXHIBIT B****SUBJECT: LIVING CONDITIONS**

1. No more than one prisoner will be housed in any cell or single occupancy room. However, if there is an emergency caused by a riot, fire, or other disaster making living units unusable, and no other reasonable option is available, two people may be housed in said cells or rooms for a period of short duration while arrangements are made for alternative housing.
2. Each cell or single occupancy room will have a floor area of at least sixty square feet, except cells which are presently in use at PNM at Santa Fe. Those cells may continue to be utilized if they meet the other provisions of this order; inmates will not be housed in said cells for more than 10 hours per day except those confined in disciplinary segregation and those classified as maximum security who are governed by the provisions of the maximum security classification standards and other orders in this case.
3. Each single cell or room will contain at least: A. Lavatory with hot and cold running water; B. Toilet flushable by the prisoner; C. Bunk; D. Desk; E. Chair or stool; F. A locker or other storage space; G. Natural light; H. Artificial lighting which is both occupant and centrally controlled and which is of at least 30 footcandles at 30 inches above the floor. In cells which do not currently have lighting which is occupant controlled, such lighting will be provided no later than the completion of the renovation authorized by Laws 1980, Chapter 24; I. Ventilation which circulates at least 10 cubic feet of fresh or purified air per minute with $\frac{1}{3}$ fresh outside air, and; J. Acoustics that ensure noise levels that do not interfere with normal human activities and are normally less than 65 decibels, A scale, (dBA) during the day and 45 dBA during sleeping hours; K. Adequate

heating to provide temperatures within a normal comfort range.

4. If dormitories or multiple occupancy rooms are utilized, they will provide a minimum of:

- A. 60 square feet of living space per person, excluding shower and lavatory facilities and dayroom space;
- B. Thirty footcandles of light at a level of 30" from the floor for reading purposes;
- C. Ventilation which circulates at least 10 cubic feet of fresh or purified air per minute per person with $\frac{1}{3}$ fresh outside air;
- D. Flush toilets and lavatories in the ratio of 1 to 8 inmates; however, this requirement will not apply to unrenovated dormitories so long as the existing toilets and lavatories are maintained in working order;
- E. Shower facilities in the ratio of 1 to 15 minutes;
- F. Hot and cold water with appropriate mixing devices in the showers and lavatories;
- G. Mirrors over lavatories;
- H. Sanitary type drinking fountain or single service drinking cups for each dormitory and cellblock;
- I. Personal lockers and/or other adequate space for personal belongings;
- J. Noise levels normally no more than 65 decibels, A scale (dBA) during the day and 45 dBA during sleeping hours;
- K. Ready access during non-sleeping hours to desks, tables, and/or other furniture suitable for use in reading and writing;
- L. Adequate heating to provide temperatures within a normal comfort range;
- M. There will be no double-bunking in dormitories.

5. Every prisoner will be provided with a sanitary mattress and at least two sheets, two blankets, a pillow and pillow case. Linen will be exchanged at least weekly and blankets, pillows and mattresses will be cleaned on a routine basis and maintained in a sanitary condition. Mattresses or mattress covers will be sanitized before reissue.

6. All prisoners will be provided clothing that is properly fitted, climatically suitable, durable, economical, easily laundered and repaired, and presentable. Said clothing will include outergarments, undergarments, and shoes.

7. Prisoners will be provided sufficient clean clothes to be able to change underwear and socks daily and other clothes at least 3 times per week except for coats, jackets and shoes. Additional clothes must be provided for work and recreation.

8. Each prisoner will be provided with adequate amounts of necessary personal hygiene items, cigarettes and/or tobacco and two clean towels which are exchanged at least twice a week.

9. Each prisoner will be allowed to shower daily, except those in maximum security housing units.

10. Measures will be taken by the Department of Corrections to provide maximum access to and utilization of the currently available activity space. Adequate equipment for a variety of leisure time activities will be provided.

11. The Secretary of Corrections will continuously maintain accurate data as to the maximum number of prisoners who can be housed at PNM pursuant to the provisions of *Duran v. Apodaca*. The allowable maximum number of prisoners will not be exceeded at PNM.

12. A written routine daily housekeeping plan will be executed which includes at least the following: (a) the

areas to be cleaned and procedure for cleaning said areas; (b) the frequency of cleaning each area; (c) the specific person or persons assigned to supervise the cleaning of each area; (d) the procedure for procurement and maintenance of housekeeping equipment and supplies.

13. A qualified person, familiar with health and safety standards and practices, will oversee health and sanitation conditions at PNM.

14. Cleaning activities will be supervised at all times by particular assigned civilian staff.

15. A written checklist will be utilized for a daily inspection to be done of all areas by a specific employee to assure that all areas are clean and sanitary. The employee will sign the document certifying that he/she conducted the inspection and that the report is accurate.

16. (a) Screens will be maintained on all windows and doors; (b) window panes will be continually maintained in all areas; (c) structural defects which allow rodents to enter the buildings will be cured; (d) an effective vermin and pest control program will be implemented.

17. A comprehensive written preventive maintenance manual will be prepared and utilized which includes an inventory of all equipment and systems at PNM along with a schedule for regular inspection and maintenance of said equipment and systems which include the maintenance requirements of the manufacturer's specifications. The manual will specifically state the employees responsible for executing the plan and specific measures to be taken in maintaining each machine or system. Those persons will be adequately trained for said duties.

18. A checklist will be developed for the inspection and maintenance of each machine or system and the person responsible for inspection and maintenance will certify that the facts stated on the checklist are true.

19. An adequate inventory of parts regularly needed will be maintained to prevent unnecessary delays in major repairs.

20. A comprehensive fire safety plan will be prepared and executed for the Penitentiary of New Mexico which includes: (a) specific provisions for adequate fire protection service; (b) the specific equipment such as fire extinguishers and fire hoses to be located at specific appropriate places within the institution and inspection and preventive maintenance schedules for said equipment; (c) the specific responsibilities of staff and prisoners in the event of a fire, and; (d) the training to be given staff and prisoners in fire safety. This plan will be certified by the state fire marshal or another qualified authority as adequately providing for the safety of the prisoners at PNM.

21. PNM will have available to it on a regular basis a qualified fire safety officer to ensure that the institution meets fire safety and prevention standards including those provided by the Life Safety Code (1976, National Fire Protection Association Document No. 101 or any superseding standards promulgated by that association). Said person will have a minimum of three years experience in fire prevention and safety work.

22. The institution will be inspected at least twice a year by the State fire marshal or other qualified fire safety expert. If the facility in any way does not meet state fire safety standards or the standards of the Life Safety Code, curative actions will be immediately taken.

23. The institution has a written evacuation plan prepared in the event of fire or major emergency which is certified by an independent inspector trained in the application of the Life Safety Code. (current edition). The plan is reviewed annually, updated if necessary, and re-issued to the local fire jurisdiction. The plan includes:

- a. location of building/room floor plans;
- b. use of exit signs and directional arrows for traffic flow;
- c. location of publically posted plan;
- d. at least quarterly drills for all inmates and staff, except that drills may be limited to staff when evacuation of extremely dangerous inmates would be involved. In such cases, the inmates will be fully instructed as to all aspects of the evacuation plan.

24. Any exposed electrical wire and water leakage problems will be forthwith cured. In addition, PNM will meet the standards required by state and local law and the Underwriters Electrical Code.

25. Mattresses and trash containers will be made of materials which meet fire safety standards.

26. No cross-connections will exist between the potable and non-potable water systems.

27. All applicable State of New Mexico plumbing standards and/or regulations will be adhered to.

28. All prison industries will comply with all Occupational Health and Safety Administration (OSHA) or superseding New Mexico standards and will be inspected at least yearly.

29. Strip cells shall not be used for the housing, discipline, or detention of prisoners. -

30. In addition to the above, no later than the completion of the renovation authorized by Chapter 24, Laws 1980, the Penitentiary of New Mexico at Santa Fe will meet applicable national standards as to living conditions for inmates.

POLICY STATEMENT

EXHIBIT C

SUBJECT: INMATE ACTIVITY

General Purpose:

One part of the statutory mandate to the Department of Corrections and Criminal Rehabilitation is to "try to rehabilitate" offenders committed to its custody and care. This statutory mandate will be implemented through the following policies and procedures:

1. After classification, a comprehensive program will be designed for each inmate. The program will include an appropriate housing assignment and provision for medical and mental health needs. The program will also include, consistent with orders or policy statements in the *Duran* case, vocational training, educational programs, work programs, and any special problem needs.
2. The inmate's progress in his or her program will be monitored by the intake and classification center and the institutional classification committee.
3. Programs will be linked to community resources if possible.
4. Vocational and educational testing will be provided to all newly committed inmates and as necessary during the inmates' imprisonment. Vocational and educational counseling will be coordinated with the testing.
5. All inmates classified as needing and desiring some type of education will be provided an appropriate educational program. The institutional educational program shall be comparable to that in the public school system in New Mexico in quality, staff, supplies, equipment, institutional materials and programs including special and bilingual educational programs. Staff will be provided in quantity and expertise to insure access by all inmates classified to educational programming. Educational and vocational programming will be available on a year

round basis. However, the adoption of this policy statement does not entitle inmates covered by it to rights under state or federal education or education financing laws and/or regulations to which they would not otherwise be statutorily entitled.

6. The Corrections Department will maintain a certificated, comprehensive, and continuous educational program for inmates that extends through high school level. Counseling to inmates will be provided under the supervision of the ICC initially upon their commitment to the Department of Corrections and periodically to insure proper program placement.

7. If the ICC evaluation indicates that vocational programming is appropriate, an opportunity to participate in such programming will be provided. Vocational and educational programming will be designed to develop marketable skills. All inmates determined by classification as needing some type of vocational or pre-vocational training and indicating interest in such training will be given the opportunity to participate in training. To qualify as a full time vocational or pre-vocational program, the program must meet for a minimum of 4 hours a day, 5 days a week except for recognized holidays and vacations. Inmates participating in a vocational or pre-vocational program on less than a full time basis shall have the opportunity to participate in other programs or be employed in a job for the remainder of the day. The provisions of this section shall be implemented as soon as possible, but no later than July 1, 1981.

8. Inmates will not be excluded from access to programming based on race, religion, nationality, sex or political belief.

9. Inmates working as teachers' assistants or para-professionals need not be licensed by the State of New Mexico but shall receive training and supervision from appropriate persons.

10. To qualify as a full time educational program for an inmate, other than college, the program must meet for a minimum of 4 hours a day, 5 days a week. Inmates participating in the educational program on less than a full time basis shall have the opportunity to participate in other programs or be employed in a job for the remainder of the day.

11. Inmates who are qualified shall have a reasonable opportunity to participate in an appropriate college or college extension program when such programs are reasonably accessible.

12. Recreational programming will be supervised by a full time, qualified recreation director. The director, in coordination with other institutional staff and community resources, will implement a comprehensive recreational program including leisure time and athletic activities. An appropriately qualified person designated by the warden will develop and implement comprehensive social programs and activities for all segments of the inmate population.

13. Inmates will be provided access to a minimum of one hour per day exercise and access to recreational opportunities including, when weather permits, outdoor exercise.

14. The inmate work program will provide the opportunity for full time employment to all inmates excluding those in full time educational or vocational programs or those in maximum security status or disciplinary segregation. Jobs will include prison industries, vocational training and institutional assignments. A job or assignment shall be considered full time if it provides for no less than 5 hours work per day, 5 days per week.

15. Prior to release or discharge, all inmates will enroll in a program to prepare them for their re-entry into society within statutory limitations. Pre-release programming will combine lectures with family and individual counseling, and survival skills training. Institutional

staff and community volunteers will be used as appropriate.

16. The Department will make good faith efforts to provide work and school release, pre-release and other community based programming and/or housing for inmates appropriately identified by the classification process.

17. All inmates will be provided with at least 8 hours a day of meaningful activity except those in disciplinary segregation and those classified as maximum security who are governed by the terms of the policy statement on maximum security.

18. The parties recognize that the requirements of this policy statement cannot be met at the present time. The Department of Corrections will act in good faith to utilize staff, facilities and services to meet those requirements. Further, as soon as practicable, a comprehensive plan with timetables will be produced by the National Institute of Corrections in coordination with the Department of Corrections to come into total compliance with the provisions of this policy statement. Said plan will be filed with the Court. The recommendations of said plan will be executed unless the Department can show cause why compliance would not be in the best interest of meeting the principles of this policy statement. If the Plaintiffs consider the plan or the timetable to be inadequate, they may request further relief from the Court.

19. The provisions of the policy statement relating to inmate activity are not applicable to prisoners confined in disciplinary segregation.

20. Inmates may refuse to participate in institutional programs except work assignments.

21. At the completion of the current renovation, indoor dayroom or leisure activity space of no less than 35 sq. ft. per inmate will be provided to all inmates.

POLICY STATEMENT

EXHIBIT D

SUBJECT: MEDICAL CARE

1. All inmates shall be provided with adequate medical and dental services needed to maintain basic health.
2. The medical care delivery system will be under the supervision of a full time licensed medical doctor who is normally on-site at the Penitentiary of New Mexico at Santa Fe at least forty hours per week. The doctor will report to an appropriate designee of the Secretary of the Department of Corrections in the central office.
3. A licensed medical doctor will be on-call 24 hours a day. In addition, substitute coverage by a licensed medical doctor will be provided for those times during which the regular on-site doctor is not available (e.g., vacation time). Written contracts, as appropriate, will be entered with those persons performing these duties.
4. In addition, written contracts will be entered into for the provision of medical specialists to provide any and all necessary specialty consultation or services either on-site or in outside facilities. Such arrangements will include, but not be limited to, a general surgeon; an ear, nose and throat specialist; an orthopedic surgeon and a general internist. An obstetrician and gynecologist will be added if women are housed in the facility. Specialty consultation and reports shall be on specific consultation forms which shall be included in the medical record. Specialty services must be provided in a timely manner as prescribed by the medical staff.
5. At a minimum, the present staff complement of four licensed physician's assistants and three infirmary technicians or equivalent personnel will be maintained.
6. There will be personnel on each shift with basic training in first aid and basic life support cardiopulmonary resuscitation who are continually within voice

contact range of all inmates in living or operational units.

7. Adequate medical equipment and supplies will be provided for medical care delivered at the facility.

8. On or before September 1, 1980, the on-site medical doctor at the Penitentiary of New Mexico at Santa Fe will produce a written evaluation of the personnel, facilities and equipment necessary to provide adequate medical care to the inmates. All such personnel, facilities and equipment will be promptly provided unless the Defendants show cause to this Court why they should not. Copies will be provided to counsel for the Plaintiffs who may apply for relief from this Court if the plan is deemed inadequate or if the plan is not executed within a reasonable time.

9. Entrance examinations which at least meet the requirements of Exhibit A of this policy statement will be provided all prisoners committed to the custody of the Department of Corrections. Screenings and evaluations will be conducted by a licensed physician or an appropriately trained medical staff member under the close supervision of a licensed physician. A licensed physician will review within seven days the file of each inmate who was examined by a physician's assistant.

10. At the time of entry to the prison, each inmate will receive written and verbal instructions explaining the procedures for gaining access to medical and dental care. Such instructions may be incorporated into the Inmate Handbook. Medical care services and dental care services will be fully available to all inmates regardless of custody status or other factors.

11. At the Penitentiary of New Mexico at Santa Fe or at any facility which houses more than 250 inmates, sick call will be conducted by a licensed physician or an appropriately trained physician's assistant on a daily basis. Inmates who request to be seen by the doctor or

physician's assistant will be seen as soon as is practical and/or necessary. Appropriate examination rooms which guarantee privacy will be provided and utilized for interviews and examinations.

12. There will be a licensed physician or physician's assistant on duty at the Penitentiary of New Mexico at Santa Fe 24 hours a day. If at any time during the day or night an inmate states to any member of the staff that he/she is sick or injured and is in need of care or if any member of the staff receives information to that effect, the staff member will promptly notify the designated physician, medical technician, or physician's assistant who will promptly provide appropriate care. All such requests and the actions taken will be recorded and maintained in a medical log and the medical file of the inmate. If information that an inmate may be sick or injured and in need of medical care is transmitted to the designated physician, medical technician, or physician's assistant and the inmate is not promptly examined, the reasons therefor will be noted in the log and the inmate's medical file.

13. Physical and dental examinations of every inmate will be conducted by a licensed physician or dentist at least once every two years.

14. As soon as possible after July 1, 1980, the Department of Corrections will have a full-time licensed dentist who will be in charge of dental care for the entire system. The dentist's primary duty will be dental care for the inmates at the Penitentiary of New Mexico at Santa Fe. Adequate dental facilities, equipment and support staff will be provided. Written agreements will be made with dental surgeons and other specialists to provide necessary services which cannot be provided by the dental staff at the facility.

15. On or before September 1, 1980, a licensed dentist with experience in full-time dental care delivery in pris-

ons will produce a written evaluation of the personnel, facilities and equipment necessary to provide adequate dental care to the inmates. Copies will be provided to counsel for the Plaintiffs who may apply for relief from the Court if the plan is inadequate or if the equipment is not purchased within a reasonable time.

16. There will be 24-hour emergency medical and dental care availability as outlined in a written plan which includes arrangements for: emergency evacuation of the inmate from the facility; use of an emergency medical vehicle; use of one or more designated hospital emergency rooms or other appropriate health facilities; and security procedures providing for the immediate transfer of inmates when appropriate.

17. Eyeglasses, dentures and other usual prosthetic devices will be provided to those prisoners who need them as soon as is practicable.

18. Physical therapy will be provided by appropriately trained persons to those inmates deemed by the physician to need such care.

19. Detoxification from alcohol, opioids, stimulants and sedative hypnotic drugs will occur under the care and supervision of the licensed physician.

20. Individual treatment plans will be developed by a physician for persons identified as chemically dependent. Those plans will be promptly carried out by appropriate personnel.

21. Inmates who need health care beyond the medical resources available at the penitentiary, as determined by the responsible health authority, will be transferred to a facility where such care is available. Adequate transportation vehicles and staff will be made available so that said needed health care will not be delayed.

22. The use of physical restraints for medical or psychiatric purposes will only be done pursuant to a written

policy and defined procedure under the direct supervision and control of a physician. Handcuffs will not be used for restraint in such cases. Only those methods of restraint which are appropriate to the general population will be allowed. When restraints are used, they will only be used for the shortest period of time necessary and the use, type of restraint, length of use and reason therefor will be fully documented in a medical log and the inmate medical file. Any person in such restraints will be monitored at least every thirty minutes.

23. No inmate will be deprived of rights or normally given privileges or be punished because of the request for or receiving of medical or dental care except where a limitation of activity is a necessary part of the prescribed medical or dental care.

24. Special therapeutic diets will be prepared and served to those inmates who need them as determined by the physician.

25. All drugs and narcotics will be prescribed and administered pursuant to state and federal laws. Psychotropic medications will be prescribed and monitored by a licensed psychiatrist pursuant to the standards of the American Psychiatric Association. All psychotropic medications and prescription drugs subject to abuse by inmates will be distributed by physicians and physician's assistants under the unidose system.

26. A "problem-oriented medical records" structure will be utilized which will include:

The completed receiving screening form;

Health appraisal data forms;

All findings (negative as well as positive, when pertinent), diagnoses, treatments, dispositions;

Prescribed medications and their administrations;

Laboratory, x-ray and diagnostic studies;

Signature and title of documentor;
Consent and refusal forms;
Release of information forms;
Place, date and time of health encounters;
Health service reports, e.g., dental, mental health and consultations;
Treatment plan, including nursing care plan;
Progress reports; and
Discharge summary of hospitalization and other termination summaries.

27. The medical files will be separate from the confinement record and the medical files will be secured under the principle of doctor-patient confidentiality.

28. Adequate clerical assistance will be provided to the medical staff to carry out the terms of this order.

29. Inmates will not be utilized in the health care delivery system except for assignments which are essentially janitorial in nature.

30. Except in emergency situations which immediately threaten the life or health and in which the inmate is unable to give informed consent, informed consent will be received in writing and with a witness prior to surgical and non-routine treatments and examinations. Verbal informed consent will be received prior to other examinations, treatments or medical procedures. Informed consent requires that the inmate receives the material facts regarding the nature, consequences, risks and alternatives concerning the proposed treatment, examination or procedure.

31. In addition to the above, women prisoners will during the initial health assessment receive the following:

1. Inquiry about:
 - a. The menstrual cycle and unusual bleeding;

- b. The current use of contraceptive medications;
- c. The presence of an I.U.D.;
- d. Breast masses and nipple discharge;
- e. Pregnancy.

2. The physical assessment shall include:

- a. A pelvic examination which must be conducted with the maximum concern for human dignity and which must not be subverted for security purposes;
- b. A breast examination.

3. Specimens collected shall include a culture for gonorrhea, an appropriate test for cancer and a serological test for syphilis.

4. Provision shall be made for the special dietary and housing needs of pregnant women, and the continuation of contraceptives for therapeutic reasons. Women classified into community programs shall be offered family planning services.

32. In addition to the health care provided all inmates, women inmates shall receive the following care:

- a. Particular health problems of women, such as menstrual irregularities, shall receive appropriate gynecological care. Feminine hygiene items will be supplied. Douching will be made available and will be accompanied by proper education and precautionary advice.
- b. A pregnant inmate will have the equivalent medical care as she would have were she not incarcerated.
- c. Health maintenance procedures shall be established including, but not limited to, an appropriate test for cancer, venereal disease screening, breast examinations, etc.

EXHIBIT A

1. Receiving screening will be performed by trained staff on all inmates (excluding intra-system transfers) upon arrival at the facility with the findings recorded on a printed screening form approved by the health authority. The screening includes at least:

Inquiry into:

Current illness and health problems, including venereal diseases and other infectious diseases, and those health problems specific to women;

Medications taken and special health requirements;

Use of alcohol and other drugs which includes types of drugs used, mode of use, amounts used, frequency used, date or time of last use, and a history of problems which may have occurred after ceasing use (e.g., convulsions);

Past and present treatment or hospitalization for mental disturbance or attempted suicide;

Identification will also be made of those persons who need immediate care for serious and urgent mental health problems, such as overt psychosis, severe depression, or suicidal ideation;

Other health problems designated by the responsible health authority official.

Observation of:

Behavior, which includes state of consciousness, mental status, appearance, conduct, tremor and sweating;

Body deformities, ease of movement, etc.;

Condition of skin, including trauma markings, bruises, lesions, jaundice, rashes and infestations, and needle marks or other indications of drug abuse.

2. Medical screening will be performed immediately upon arrival at the institution for all intra-system transfers which includes, at a minimum:

Inquiry into:

Whether the inmate is being treated for a medical problem;

Whether the inmate is presently on medication;

Whether the inmate has a current medical complaint;

Observation of:

General appearance and behavior;

Physical deform[i]ties, evidence of abuse and/or trauma;

3. Health appraisal for each inmate (excluding intra-system transfers) will be completed within 14 days after arrival at the facility. In the case of an inmate who had documented evidence of a health appraisal within the previous 90 days, a new health appraisal is not required except as determined by the designated health authority. Health appraisal includes:

Review of the earlier receiving screening:

Collection of additional data to complete the medical, dental, mental health and immunization histories;

Laboratory and/or diagnostic test results to detect communicable disease, including venereal disease and tuberculosis;

Recording of height, weight, pulse, blood pressure and temperature;

Other tests and examinations as appropriate;

Examination including review of mental and dental status;

Review of the results of the examination, tests, and identification of problems by the appropriate health authority officials.

Initiation of therapy when appropriate, and

Development and implementation of treatment plan including recommendations, where medically appropriate concerning housing, job assignment, and program participation.

4. The collection and recording of health appraisal data will be consistent with the following:

The process is completed in a uniform manner as determined by the health authority;

Health history and vital signs are collected by qualified health personnel; and

Collection of all other health appraisal data is performed only by qualified health personnel.

5. The program of dental care for all inmates will consist of:

Dental care provided by a dentist licensed in the state;

Dental screening and written or verbal instructions on hygiene within 14 days of admission;

Dental examinations, supported by x-rays, based on information from the screening and performed within 30 days after arrival at permanent facility;

Treatment in accordance with a treatment plan not limited to extractions that is considered appropriate for the needs of the individual as determined by the institutional dentist; and

Consultation with referral to recognized specialists in dentistry.

POLICY STATEMENT**EXHIBIT E****SUBJECT: MENTAL HEALTH CARE**

1. All inmates who, by reason of mental illness or mental retardation, require special housing and/or programs, will be identified and arrangements will be made for such housing and/or programs.
2. All inmate members of the Plaintiff class who are in need of mental health care, as determined by a qualified practitioner, will be identified and the needed care and/or treatment programs will be provided when needed. Services will be available to those who need them in a context of varied modalities which will include, but not be limited to: Crisis intervention; brief and extended evaluation/assessment; short-term therapy (group and individual); long-term therapy (group and individual); therapy with family and significant others; counseling; medication; detoxification; and drug and alcohol counseling.
3. In order to aid in compliance with the principles of Paragraphs 1 and 2 above, arrangements will be made to procure within 60 days from the date of adoption of this policy statement a written comprehensive evaluation of the personnel, facility and programmatic needs of the Penitentiary of New Mexico by a person or persons trained and skilled in the area of mental health care delivery in prisons. The evaluation will contain recommendations for the implementation of the terms of this policy statement. Said person or persons will include at least one licensed psychiatrist who will be jointly agreed upon by the parties.

The written evaluation will be provided to the Department of Corrections and counsel for the plaintiffs. Within 30 days of the receipt of said document, the Department of Corrections will prepare a comprehensive plan with reasonable timetables to comply with the rec-

ommendations of the report. Said plan will be presented to counsel for the plaintiffs and filed with the Court.

The Department of Corrections will comply with the recommendations in the report unless it can show cause to the Court why compliance would not be in the best interest of meeting the principles of Paragraphs 1 and 2 above.

If the plaintiffs are not persuaded that the plan will meet the requirements of Paragraphs 1 and 2 within a reasonable time, they may petition the Court for further relief.

4. Good faith efforts will begin immediately to hire a licensed and otherwise qualified psychiatrist to be employed at the Penitentiary of New Mexico to provide needed psychiatric care and to be responsible for the mental health delivery system at the Penitentiary and the Department of Corrections' system. Until that time, contract psychiatric services will be provided on-site sufficient to meet the psychiatric needs of the population, including the prescription and monitoring of psychotropic medications, according to the principles of the American Psychiatric Association and accepted modern practice in the general community.

5. Inmates who need immediate care for serious and urgent mental health problems, such as overt psychosis, severe depression, or suicidal ideation will be screened and evaluated by a licensed psychiatrist, a qualified psychologist, or other qualified practitioner of medicine. Immediate and appropriate mental health care will be provided to such inmates.

6. All newly committed inmates will be given a routine mental health appraisal by mental health staff within 30 days of admission. Such evaluations are brief and include at least:

Group or individual interviews;

Behavioral observation;
A records review;
Group assessment to screen for emotional and/or intellectual abnormalities;
A written report of the findings;
Referral, by said mental health staff where appropriate, for a comprehensive individual mental health evaluation.

The comprehensive individual mental health evaluation on specially referred inmates will be completed within 14 days after the date of referral and include at least:

Review of mental health screening and appraisal data;
Collection and review of additional data from staff observation, individual diagnostic interviews and tests assessing intellect and coping abilities;
Compilation of individual's mental health history; and
Development of an overall treatment/management plan with appropriate referral.

7. All mental health services will be provided by mental health professionals who meet education and licensure/certification criteria specified by their respective professional disciplines (i.e., psychiatrists, psychologists, psychiatric nurses, social workers). All such persons will be limited in their functioning to their demonstrated areas of professional competence.

8. If mental health services staff believe some psychotropic medication program is needed, they will refer the inmate to the psychiatrist for evaluation, diagnosis, prescription and monitoring.

9. Written policies and job descriptions will be produced which comprehensively define the duties and limi-

tations of the entire mental health services program and each member of that staff.

10. Inmates will not be utilized in any way in the mental health care delivery system except for assignments which are essentially janitorial in nature.

11. Upon commitment to the Department of Corrections, all inmates will be informed verbally and in writing of the mental health care services available and how to request mental health assistance. The inmate handbook will also include that information. The information will be conveyed in a language which can be understood by the inmate.

12. All correctional officers will have training in basic mental health screening, including the recognition of symptoms of mental disturbances most common to the inmate population.

13. If at any time during the day or night an inmate states to any members of the staff that he/she is in need of mental health care or services or if any member of the staff receives information that such care or services are needed, the staff member will promptly notify an appropriately designated professional of the mental health staff who will promptly take all necessary action to provide any needed examination and services. All such requests and the actions taken will be recorded and maintained in a mental health log and the inmate's mental health file. The mental health file may be included in the medical file. If no action is taken, the reason therefore will be similarly recorded.

14. A written treatment plan which specifies the particular course of therapy and the roles of all personnel in carrying out the plan will be prepared by a psychiatrist or a qualified clinical psychologist for each inmate requiring mental health services. Similarly, a specific

psychiatrist or qualified clinical psychologist will be responsible for monitoring the plan and assuring that it is being appropriately executed.

15. Members of the mental health staff and their agents or people working in concert with them will be bound by professional standards of psychiatrists and psychologists in the community as well as state law and may not divulge information gained from inmates except as is consistent with such standards and laws. Those standards will be enunciated in particular as a part of the plan provided by paragraph 3 above. Records of the mental health staff will not be available to other institutional staff or inmates.

16. Members of the mental health staff will only make recommendations about an inmate to the parole board, the Governor concerning executive clemency requests, the classification committee or the disciplinary committee consistent with standards of psychiatrists and psychologists in the community as well as state law and may not divulge information gained from inmates except as is consistent with such standards and laws. Those standards will be enunciated in particular as a part of the plan provided by paragraph 3 above.

17. Upon commitment to the Department of Corrections, inmates will be informed as to the policy concerning mental health patient confidentiality.

18. Psychological test protocols and other "raw data" will not be available to anyone but qualified mental health professionals on the mental health staff or consulting staff. "Raw data" is test information not accompanied by interpretive statements made in a report by qualified mental health professionals. Computer generated statements are considered raw data. "Qualified mental health professionals" in this paragraph include only qualified psychiatrists and clinical psychologists with appropriate education and training in psychological test interpretation.

19. All Inmates committed to the Department of Corrections and Criminal Rehabilitation may only be given mental health treatment without his/her informed consent pursuant to the standards of the New Mexico Health and Developmental Disabilities Code.
20. Aversive therapy will not be utilized.
21. Any involuntary transfers of prisoners to mental hospitals or to other special living units for the treatment of mental health problems will be conducted consistent with the due process requirements outlined in *Vitek v. Jones*, 48 U.S.L.W. 4317 (March 25, 1980).
22. One member of the mental health staff will be designated as the official liaison person with the New Mexico forensic hospital. That person will be responsible for assuring that all appropriate documents are transferred between institutions concerning the past and future care and treatment of the inmate and to assure that the appropriate follow-up care is provided when inmates are returned from the hospital to the penitentiary.
23. Good faith efforts will be made to hire qualified mental health professionals who speak the same language as segments of the inmate population.
24. Special psychiatric units in the infirmary or psychiatric area can be used only under the direct supervision of a doctor or psychiatrist and only for legitimate medical or psychiatric reasons.

POLICY STATEMENT**EXHIBIT F****SUBJECT: STAFFING AND TRAINING**

1. Adequate staff and staff training will be provided to reasonably assure the safety and protection of inmates and to allow the Department of Corrections to comply with all other orders or policy statements in *Duran v. Apodaca*.
2. At least one correctional officer will be stationed in each cellblock so that all inmates will have voice contact with a correctional officer at all times. In addition, irregular rounds of the entire cellblock will be made at least one time per hour.
3. As soon as possible, but no later than September 1, 1980, at least one correctional officer will be stationed between the inner gate and outer gate of each dormitory at the Penitentiary of New Mexico at Santa Fe at all times that any inmates are housed in said dormitories. The said officers will position themselves in such a manner that they may have visual observation of inmates at all times.
4. Training will be provided to all staff which is equivalent to that required by the Manual of Standards for Adult Correctional Institutions of the Commission of Accreditation for Corrections.
5. As soon as is practicable, a qualified person or persons selected by the Department will review the current facility and its use; all plans for future renovation or building; all plans for future jobs, activities, programs, and services to members of the *Duran* class; and the requirements of the orders or policy statements in *Duran v. Apodaca*; and will make comprehensive recommendations as to the number of correctional staff needed under the various conditions presented to meet the requirements of those orders and policy statements. Those recommendations will be provided to the parties.

Within 30 days of receipt of said recommendations, the Department of Corrections will file with the Court and with the plaintiffs a plan for complying with said recommendations, including timetables, or will show cause why they should not comply.

If the plaintiffs deem the recommendations, the plan or the timetables to be inadequate they may apply to the Court for further relief.

POLICY STATEMENT

EXHIBIT G

MAXIMUM SECURITY

1. Maximum security classification is used when inmates require closer supervision and separate housing from the general population. Every effort shall be made to return maximum security inmates to the general population as soon as practicable, but some inmates may spend relatively extensive periods of time in this status. Maximum security classification is not for the purpose of punishment. This policy statement has no application to those inmates confined in disciplinary segregation.

2. The words "threat to the security of the institution" or their equivalent, as used in any order in *Duran v. Apodaca*, means a substantial threat of an act or acts of violence upon others, substantial destruction of state property, escape or attempted escape, riot or inciting a riot, or taking of hostages. When action is taken based upon a finding of a threat to the security of the institution, the specific reason(s) comprising the threat will be documented.

3. An inmate may be placed involuntarily in maximum security by the classification committee pursuant to the criteria stated in one or more of the following five subsections:

(a) The classification committee specifically finds the following:

(i) The Disciplinary Committee has recently found that the inmate has committed an act of violence, substantial destruction of state property, escape or attempted escape, riot or inciting a riot, or taking of hostages, and as a result of such finding has been sentenced to disciplinary segregation; and

(ii) Because of such finding, considered along with all other classification and other relevant data, there is a

substantial likelihood that if released to the general population the inmate would present a substantial threat to the security of the institution or to the safety of others.

(b) The classification committee specifically finds, based upon recent overt acts, that an inmate presents an imminent threat of serious bodily harm to others or an imminent threat of escape. Pending action of the classification committee under this subparagraph, the ranking shift officer may temporarily house an inmate in maximum security status until the next working day, at which time the classification committee shall determine whether the inmate will remain in maximum security status as set forth above. The ranking shift officer who temporarily detains an inmate under this section will document the reasons for the action and will give a copy of the document to the inmate within eight hours.

(c) The classification committee specifically finds that the inmate is a victim of a violent act and there is clear and convincing evidence that if he remains in general population he will be subjected to additional violent acts.

(d) The classification committee specifically finds that the inmate's safety is jeopardized by an immediate life threatening conflict with other inmates in the general population which requires temporary separation from the general population because he cannot otherwise be provided with adequate protection.

(e) The classification committee specifically finds that the inmate has demonstrated a continuous, substantial and documented violation of institutional rules. This sub-section cannot be used in combination with disciplinary action for the same acts. An inmate may not be classified in this category for more than 5 days at a time.

4. An inmate may also be placed in maximum security if the inmate believes that housing in the general popu-

lation places the inmate in jeopardy of serious bodily harm and requests placement in maximum security. Inmates requesting assignment to maximum security may be required to sign a written request slip, stating their desire for assignment to maximum security. Inmates requesting assignment to maximum security may be placed therein immediately without waiting for the formal hearing before the classification committee.

Any inmate who has voluntarily placed himself in maximum security status will be reclassified within 5 working days of a request to be reclassified. However, the inmate may be reclassified into maximum security status involuntarily if any of the conditions of paragraph 3 above are met.

5. A statement detailing the alleged specific facts and specific reasons for classifying an inmate into maximum security shall be given to the inmate at least 24 hours prior to the classification hearing. If the basis for placing the inmate into maximum security involves the testimony of a confidential informant, the disclosure of which would place such informant in jeopardy of serious bodily harm, the inmate shall be given a summary of the facts upon which maximum security classification is being requested sufficient to allow him to challenge the truthfulness of the facts and/or the need for maximum security status.

6. Prior to placing an inmate in maximum security, the classification committee must make a finding of fact based upon a preponderance of the evidence that the requirements of paragraph 3 above have been met. Prior to classifying an inmate in maximum security status, the classification committee shall explore alternatives other than specialized housing and shall prepare a statement of the alternatives explored and the reason for rejecting each of them. If an inmate is placed in maximum security housing, the inmate will be housed in a single occupancy cell or room that provides safety and comfort

and shall be allowed to participate in institutional programs as set forth herein; however, if there is an emergency caused by riot, fire or other disaster making living units unusable, two people may be housed in said cells or rooms for a period of short duration while arrangements are made for alternate housing. Each case shall be reviewed on the basis set forth in paragraph 7, with the goal of terminating the separate housing assignment as soon as practicable.

7. The classification committee shall review the status of each inmate at least every 7 days for the first two months and at least every 30 days thereafter. More frequent reviews may be scheduled based on the request of the case manager or the inmate. At each review, the classification committee shall determine whether there is substantial evidence to indicate that the initial reasons for classification into maximum security still exist. If they do not, the inmate shall be reclassified out of maximum security status. The inmate can appear before the classification committee at each review and make a statement. In cases where the inmate refuses to appear, the committee members shall sign and document the specific reasons for the inmate's absence and make an evaluation for the inmate's working file. Nothing in this paragraph shall prevent the classification committee from making additional findings pursuant to the standards and procedures set forth above, to the effect that an inmate should be classified into maximum security status.

8. If an inmate is classified maximum security under the provisions of paragraph 3(b) hereof, the inmate's status must be reviewed by the classification committee within 7 days after the initial classification and every 7 days thereafter, and inmates shall not be housed in such status for more than 30 days. At each review, the classification committee must make a specific finding of the behavior justifying continued classification to maximum security and document that there is substantial evidence

to indicate that the reasons for the initial placement still exist.

9. In each case of an inmate classified maximum security involuntarily for over 60 days, the classification committee shall establish a set schedule of personal and program objectives involving gradual reintegration into the general population, the completion of which without an overt act evidencing an actual threat of serious bodily harm to others or escape should result in the inmate's reclassification from maximum security within an additional 60 days. However, if the classification committee documents compelling evidence that reclassification from maximum security would produce serious injury to the inmate or others or present a substantial threat to the security of the institution, then neither reclassification nor reintegration is required. Said evidence must include:

- (a) A murder within the previous two years; or
- (b) Activity in a prison riot within the preceding two years in which persons suffered serious bodily harm as a direct and intended result of action of the inmate; or
- (c) At least two recent previous overt acts causing serious bodily injury during reintegration or immediately after reclassification from maximum security under these provisions; or
- (d) An escape or attempted escape within the previous six months; or
- (e) The inmate meets the terms of paragraph 3(c) or (d) above.

10. Prisoners classified maximum security may be denied or removed from a program, job, activity, or canteen privileges generally available to the population only upon a specific, documented finding by the classification committee of demonstrated necessity for each such action based upon the recent particular behavior of

the prisoner or actions of other prisoners. In any event, every prisoner in maximum security status shall receive an opportunity for a minimum of one hour of recreation (outdoors, weather permitting) daily. In addition, as soon as practicable, consistent with the plan developed relating to inmate activity, every prisoner in maximum security status will receive an opportunity for at least five additional hours, five days a week, of meaningful programmed activities determined by the classification team. In the interim, good faith efforts will be made to provide additional meaningful programmed activities for all inmates housed in maximum security status, including, for example, expanded recreational activity, individually prescribed education and other individual or group activities utilizing staff or community resources.

11. Inmates who have been classified as maximum security will be provided with the following:

- (a) Clothing and linen issue and exchange similar to that provided to the general population;
- (b) Meals provided to the general population;
- (c) Correspondence privileges similar to that provided to the general population;
- (d) Showers and shaving five days a week;
- (e) Hair grooming and barbering;
- (f) A minimum of two hours visitation per week.

12. Access to legal resources for maximum security inmates will be provided pursuant to the consent decree in *Duran v. Apodaca*.

13. Provision will be made for prisoners in maximum security status to have access to the general library or a library cart to check out as many as five books at least every seven days.

14. Inmates in maximum security status will be allowed to retain in their personal living area at least five books and all legal papers.

15. Inmates classified in maximum security housing will be housed in single occupancy cells or rooms; however, if there is an emergency caused by riot, fire or other disaster making living units unusable, two people may be housed in said cells or rooms for a period of short duration while arrangements are made for alternate housing. They may retain their personal property, as permitted in general population, unless the classification team finds that in the case of an individual inmate, the removal of specific designated items of personal property is essential to protect the safety of the inmate or others, a fire hazard would be created, or the amount of the personal property would be excessive so as to cause violation of health, sanitation, or fire safety standards. If property is removed, it will be stored in a safe place and an inventory will be maintained. All inmates in maximum security status may have basic items needed for personal hygiene, as well as items such as eyeglasses, dentures and writing material.

16. A case manager will visit five days per week all areas in which maximum security inmates are housed and will be available to help each inmate who desires assistance or information. A qualified medical professional will conduct sick call daily in each maximum security living area and will examine every inmate who so requests to determine what medical care, if any, is required. A log will be maintained documenting each visit and each inmate contact.

17. A qualified clinical psychologist or psychiatrist will assess the status of each person classified as maximum security at least once each 30 days. Said assessment will include a personal interview with the inmate.

18. Visitation by religious personnel to inmates in the maximum security living areas will be governed by

the terms of the visitation consent order in *Duran v. Apodaca*. Inmates in the maximum security living areas will be provided with access to appropriate religious services.

19. Correctional officers assigned to maximum security living areas should be tolerant and trained to meet the needs of inmates so classified. Each supervisor will supervise and evaluate the on-the-job performance of employees assigned to maximum security living areas.

20. The Warden will designate an official to be responsible for the administration and operation of maximum security living areas who will monitor and evaluate the entire program in the areas as often as necessary to insure compliance with all applicable policy statements. The following personnel shall visit maximum security living areas:

1) Warden	Weekly visit
2) Deputy Warden	Weekly visit
3) Associate Warden/Inmate Management	Daily visit ¹
4) Superintendent Correctional Security	Daily visit
5) Chief Psychologist	Weekly visit
6) Medical Personnel	Daily visit
7) Caseworker	Daily visit
8) Chief, Classification and Programming	Weekly visit
9) Chaplain	Weekly visit
10) Shift Captain	Once per tour of duty

¹ Daily visit means one per each normal working day; days off are excluded.

21. A systematic records system will be maintained for all inmates assigned to maximum security living areas. A general activity log will be maintained for inmates and activities within such areas. In addition, a log will be maintained for all personnel entering for inspection and treatment of each inmate. A safety and sanitation officer will inspect the areas daily to insure that they are sanitary. These inspections will be recorded.

POLICY STATEMENT**EXHIBIT H****SUBJECT: INMATE DISCIPLINE**

1. **POLICY:** It is the policy of this institution to provide a safe environment for both inmates and staff and to offer programs for all inmates who wish to develop their potential for maintaining a successful community adjustment following their release. In order to implement this policy it is essential that reasonable standards of control and discipline are established and maintained. Inmates and staff will be provided with complete copies of this policy and procedure and additions/revisions as they are adopted.
2. **PURPOSE:** The purpose of this policy statement is to provide written guidelines to insure that inmate control and discipline are established and maintained in accordance with the following objectives:
 - (a) Require individual inmate compliance with reasonable behavior standards and limitations.
 - (b) Insure the general welfare and safety of all persons living and working within the institution.
 - (c) Establish and maintain fair disciplinary procedures and practices based on due process.
3. **GENERAL PRINCIPLES:** The following general principles shall be applicable in every disciplinary action taken against any inmate:
 - (a) The action shall be reasonable and proportionate in relation to the violation.
 - (b) The action shall be taken in an impartial and non-discriminatory manner.
 - (c) The action must never be arbitrary or retaliatory.
 - (d) Physical abuse is strictly prohibited.

- (e) Accurate, detailed reports of all disciplinary actions shall be maintained in accordance with this policy statement.
- (f) The words "threat to the security of the institution" or their equivalent, as used in any orders in *Duran v. Apodaca*, means a substantial threat of an act or acts of violence upon others, substantial destruction of state property, escape or attempted escape, riot or inciting a riot, or taking of hostages. When action is taken based upon a finding of a threat to the security of the institution, the specific reason(s) comprising the threat will be documented.

4. **INFORMATION TO INMATES:** Each inmate will be provided, in writing, at the time of his or her arrival, with the following information:

- (a) Policy Statement on Inmate Discipline.
- (b) Policy Statement on Grievance Procedures.
- (c) Policy Statement on Correspondence Regulations.
- (d) Policy Statement on Visiting Regulations.
- (e) Criteria for work release-school release.
- (f) Criteria for transfer among institutions.
- (g) Criteria for furloughs.
- (h) Policy Statement on Good Time.
- (i) Policy Statement on Maximum Security Status.

This information will be issued at the Intake and Classification Center and a signed, dated receipt for same will be obtained and placed in the central file of each inmate.

5. **GENERAL PRINCIPLES:**

- (a) Any act, although not specifically listed in this policy, that would be either a felony or mis-

demeanor under the Criminal Code of the State of New Mexico or the laws of the United States of America, will constitute a major or minor violation, depending on its status as a felony or misdemeanor.

- (b) In those cases where an inmate allegedly commits an act covered by statutory law, the case will be referred for evaluation for possible criminal prosecution to the local District Attorney.
- (c) An attempt to commit a major offense will not ordinarily be treated with the same severity and sanctions as the actual commission of the underlying offense.
- (d) Any portion of a sanction may be suspended for a specified period of time. Inmates will be informed in writing of the conditions under which the suspended sanction may be invoked in the future.
- (e) At the request of the inmate, he or she may receive a continuance of their disciplinary hearing when criminal prosecution is pending.
- (f) It is understood that the time limits in disciplinary segregation are exclusive of time spent in maximum security status due to reclassification. Disciplinary action does not preclude reclassification into maximum security status pursuant to the policy statement in maximum security after time spent in disciplinary segregation.

6. *MAJOR OFFENSES AND SANCTIONS* (Category A)

- (a) Riot or inciting a riot, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.

- (b) Taking of hostages, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (c) Arson, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (d) Assault with a weapon on an employee, civilian or inmate, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 365 days.
- (e) Sexual assault, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 365 days.
- (f) Unjustified killing of any person, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (g) Escape, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (h) Forging or altering official facility paper or documents, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.
- (i) Threatening others who refuse to participate in a work stoppage or work strike or participating in a work stoppage or work strike, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.
- (j) Giving or offering any official or staff member a bribe, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.

(k) Possession, introduction, or manufacture of a firearm, explosive or ammunition, confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 365 days.^[*]

OFFENSES AND SANCTIONS (Category B)

The offenses in Category B shall be considered to be major, only if one or more of the following factors is found to be present by the Disciplinary Officer and/or Disciplinary Committee:

- (a) A life threatening incident is involved.
- (b) A showing of a malicious state of mind, which threatens the security of the institution.
- (c) A direct and substantial threat to the security of the institution.
- (d) The behavior is repeated or has previously been the subject of major disciplinary action.
- (e) Substantial property damage has occurred.
- (f) Any injury received was not of a minor nature and required medical attention.
- (g) The offense was committed by more than one person, excluding offenses in which more than one person is required to commit the offense.

If evaluated as a Major Report, the sanctions in the succeeding subparagraphs will be applied. If evaluated as a Minor Report, the minor offense sanctions listed in paragraph 7 will be applied.

[*] [On July 10, 1985, the district court added paragraph (l):

(l) Possession, introduction, or manufacture of any contraband instrument which is capable of causing death or serious physical injury; confinement and disciplinary segregation for up to 30 days, and/or loss of good time not to exceed 180 days.]

CATEGORY B

These principles apply to the following offenses:

- (a) Consensual engagement in sexual acts with others; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 30 days.
- (b) Willfully refusing to obey a lawful order of any staff member; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (c) Stealing; confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 180 days.
- (d) Possession of money without authorization; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (e) Failure to report to an institutional assignment, refusing to accept a work assignment, or failing to perform work as properly instructed by a supervisor; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (f) Possession, introduction, or manufacture of a sharpened instrument, tool, or knife; confinement in disciplinary segregation for up to 20 days; loss of good time not to exceed 120 days.
- (g) Failure to follow posted safety or sanitation regulations resulting in damage or personal injury; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (h) Use of abusive words or gestures to a staff member or other inmate that are intended to provoke a fight, cause the violation of other institutional

regulations or threatens the security of the institution; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 45 days.

- (i) Intentionally interfering with count; confinement in disciplinary segregation for up to 20 days; loss of good time not to exceed 60 days.
- (j) Possession, manufacture, or introduction or use of any narcotic, narcotic paraphernalia, drugs or intoxicants not prescribed for the individual by the medical staff, or refusal to submit to an authorized drug test; confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 180 days.
- (k) Possession, alteration, using, or being under the influence of alcohol or other intoxicants, or refusal to submit to an alcohol test upon request from authorized personnel; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (l) Willful destruction or sabotage or altering of state property or property of another person; confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 180 days and/or restitution.
- (m) Possession of contraband items (i.e., anything not allowed to be received through the mail, not sold at the canteen or issued by the State); confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (n) Conduct with a visitor in violation of posted visiting regulations; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 30 days.

- (o) Violating a condition of furlough, school or work release; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (p) Knowingly making a false statement to a staff member which causes the violation of other institutional regulations or threatens the security of the institution; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (q) Gambling; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (r) Violation of correspondence regulations; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (s) Possession of another's property without written approval of shift supervisor, demanding, receiving or giving or bartering of property belonging to others; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (t) Loaning of property or items of value for profit or increased return; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (u) Extortion, blackmail, or demanding or receiving money or anything of value in return for protection from the individual or others to avoid bodily harm, or under threat of informing; confinement in disciplinary segregation not to exceed 25 days; loss of good time not to exceed 90 days.
- (v) Fighting with another person, without weapons, not causing injury requiring medical treatment;

confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.

- (w) Giving or offering any staff member or official anything of value, confinement in disciplinary segregation for up to 10 days; loss of good time not to exceed 30 days.
- (x) Self-mutilation not caused by psychiatric or psychological problems; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (y) Attempt to commit a major misconduct offense as defined in this Policy Statement (this must include an overt act in furtherance of said attempt); confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 90 days.

7. *MINOR REPORTS AND SANCTIONS:* Minor reports are reports of violations in which none of the criteria listed in Major Offenses and Sanctions (category B) are present or which were reduced from major reports.

The following prohibitive acts are minor reports:

- (a) Smoking where prohibited.
- (b) Using any machinery or equipment contrary to instructions or posted safety standards.
- (c) Improper or unauthorized use of equipment or machinery.
- (d) Failure to follow safety/sanitation regulations.
- (e) Failure to perform work as properly instructed by a staff member.
- (f) Intentional unexcused absence from work or school assignment.

- (g) Mutilating or altering clothing.
- (h) Possession of gambling paraphernalia.
- (i) Willfully failing to keep one's person, living area or work station in accordance with written, official institutional standards.
- (j) Tattooing.

Disciplinary authority for minor report disposition is delegated to the Disciplinary Officer. When the Disciplinary Officer receives a report of inmate misconduct, and following review and hearing within seven working days, he has the authority to impose minor sanctions. His decision is subject to review by the institutional superintendent who may approve, reduce or modify, refer for further investigation or dismiss. The superintendent may refer the case to the Disciplinary Officer where there is new evidence of a violation of institutional policy, or the sanction is inappropriate. The sanctions for a minor report can only consist of: dismissal of the charges; reprimand and warning; extra duty not to exceed one hour per day for no more than 30 days; confiscation; restitution; apology; restriction from social activities, e.g., movies and similar social entertainment not to exceed 30 days.

8. ***MISCONDUCT REPORTS:*** Informal resolution of minor incidents is encouraged, however, when any employee witnesses a serious violation of institutional rules or regulations, or has reasonable belief that a serious violation has occurred, the employee has a responsibility to prepare a misconduct report.

The initial misconduct report shall contain the date and time of the violation, the date and time the report was written and the date and time the report was submitted to the shift supervisor for review. The report shall include the specific rules violated; a for-

mal statement of the charge; any unusual inmate behavior; any staff or inmate witnesses; disposition of any physical evidence; any immediate action taken, including the use of force; and the reporting officer's signature.

Following the initial investigation by the reporting employee, the misconduct report must be submitted for supervisory review and a copy given to the inmate within 24 hours (or one regular working day) from the date of the incident, or when it was reported to the reporting officer. Where additional investigation is required by the reporting employee, written approval can be obtained from the warden. The written approval must be obtained in advance of the filing of the report and attached to the report. The warden may grant up to a 48 hour (or two working days) extension for good cause shown, i.e., where there is a showing of extenuating circumstances such as the perpetrator is not identified; co-conspirators are unidentified; there is a criminal investigation controlled by other agencies; or in which the inmate requests a delay in order to protect his right to remain silent; or there is a work stoppage or mass action. In all cases, however, the report will be provided to the inmate within 24 hours from the date of the incident or when made known to the reporting officer. A dismissal will be entered in the case where these time requirements are not met and extensions are not granted.

However, in the event of a continuing emergency, such as a riot, which prevents notice and hearing as required, said notice and hearing will be provided as soon as is practical.

Whenever an incident and/or inmate poses an immediate threat to employees, inmates or the security of the institution, the shift supervisor and/or other

appropriate supervisor must be notified immediately by the reporting employee so that prompt, appropriate steps may be taken to control the situation.

An inmate may not be placed in disciplinary segregation prior to a hearing. However, if the inmate poses a substantial threat to the security of the institution, other inmates, or staff, he may be housed pending a disciplinary hearing as if he were classified as maximum security. When such circumstances are found to exist, the officer placing the inmate(s) in pre-hearing detention will document the reasons and submit them with his report to the supervisor. The shift supervisor will immediately review the report and the circumstances surrounding the incident and determine whether such confinement is necessary. On the next working day, the Disciplinary Officer will review the need for continued maximum security housing pending a disciplinary hearing. The review will be based on the criteria outlined in this Policy Statement.

9. ***SUPERVISORY REVIEW:*** The shift supervisor must conduct an independent review of all misconduct reports within twenty-four (24) hours (or one working day) after reviewing the report from the reporting officer.

Upon receiving the report, the reviewing supervisor must record the date and time the review was begun and completed.

The supervisory review may be delegated to a lieutenant, subject to the shift or area supervisor's approval but no portion of the review may be conducted by the reporting employee or a non-supervisory employee. The reviewing employee or a non-supervisory employee may consult with any persons during his review, except the chairman and/or members of the Disciplinary Committee.

During the review, the supervisor must inform the inmate that he has the right to remain silent, and if criminal charges appear likely to be filed, the inmate will be given the Miranda Warnings. The reviewing supervisor must file the report with the Disciplinary Officer within eight hours after receiving the report from the reporting officer.

10. **DISCIPLINARY OFFICER:** Within two working days or 48 hours after receiving the misconduct report from the reviewing supervisor, the Disciplinary Officer will investigate the report, question all known witnesses, collect evidence, documents and statements, and will prepare a report of his findings and recommendation for submission to the institution superintendent.

All misconduct reports and actions shall be carefully reviewed by the Disciplinary Officer and if it meets the criteria of a major report, the inmate will be instructed to appear before the Disciplinary Committee at the next scheduled meeting. The inmate will receive a copy of the report and the action, and the grounds for his finding the report to be a major report. The entire report will be forwarded to the Central Records Office.

In the case of a minor report, the Disciplinary Officer will conduct a hearing within seven days of the incident or the reporting of the incident. The inmate may request that witnesses be examined, statements taken, may present his own statements and any relevant evidence. A written decision with findings will be provided to the inmate. When an inmate is found not to have committed the alleged offense, the disciplinary report will be removed from all files on the inmate. All such removed disciplinary reports will be maintained in a separate file for litigative or other non-institutional purposes only, but such reports will not be made available to or utilized by

PNM staff or the Parole Board, except at the request of the inmate. All disciplinary reports, regardless of disposition, may be kept and used for statistical or research purposes providing all identification is removed. A dismissal will be entered in a case where the time limitations are not met or extensions are not granted unless a continuing emergency precludes normal time limits from being followed.

11. **MAJOR REPORT DISPOSITION:** Disciplinary authority for the disposition of major misconduct reports is delegated only to the Disciplinary Committee. The committee shall consist of the following: staff member appointed by the institutional superintendent (chairman); institutional or Department employee (as assigned); casemanager or other Department employee (as assigned). Any other Department employee may be called by the committee as a resource to provide information or counsel. No employee may sit as a member of the committee if he had any role in the case being referred to the committee or if he or she reported or investigated the case before the committee, or if he or she was a witness to any alleged actions leading to the charge.

The committee will conduct hearings, make findings and impose appropriate sanctions for inmates found guilty of major misconduct. This committee may also reduce the report to a minor misconduct report and impose appropriate sanctions. However, only the Disciplinary Committee can, as a result of a major misconduct report, order that an inmate be placed in disciplinary segregation, recommend to the Classification Committee that an inmate's program assignment be modified, that the inmate be transferred from one institution to another, or recommend to the classification committee that an inmate's MGT or SGT be withheld or forfeited in accordance with PNM's Good Time Policy.

12. DISCIPLINARY COMMITTEE PROCEDURES: The Disciplinary Committee will conduct its proceedings according to the following guidelines:

- (a) The Disciplinary Committee will meet each Monday, Wednesday, and Friday and at other times as designated by the chairman and will prepare a record or written summary of its proceedings.
- (b) A record or written summary of the entire proceedings will be maintained by the institution and shall clearly document that the inmate was advised of his rights, including the appeal procedure. A tape recording will be made of the hearing. Excluded will be any reference to confidential sources that include identifying facts. The committee's findings will document the specific evidence relied upon and the reasons for the action taken should be specifically described, unless doing so would jeopardize institutional security.
- (c) An inmate will be given advance written notice of the charge(s) against him by the shift supervisor or Disciplinary Officer not less than 24 hours before his appearance before the Disciplinary Committee. Inmates will receive a hearing within seven regular working days from the time they receive notice of the charges, the time the incident was reported, or the time the incident occurred, unless they make a written request for a continuance. A continuance may be granted by the Disciplinary Committee to either the inmate or the institution in order to prepare their case or where additional evidence is necessary.

The inmate may request the assistance of another inmate or staff member to assist in the preparation and/or presentation of his case. Inmates are not entitled to be represented by legal counsel at

hearings before the Disciplinary Committee. If the inmate being charged cannot read or write English adequately to comprehend and defend the charge, assistance will be provided by a person capable of communicating with the inmate and the Disciplinary Committee. If an employee declines a request to represent an inmate, the inmate may select alternates. Employee representation may not include members of the Disciplinary Committee. The employee or inmate representative will be given a reasonable amount of time to consult with the inmate and investigate the incident prior to proceeding with the hearing.

- (e) The inmate charged will be present throughout the hearing except during deliberations or when in the opinion of the committee the presence of the inmate would jeopardize the physical safety of staff or inmates or his disruptive behavior during the hearing prevents the hearing from proceeding in an orderly fashion. When the inmate is excluded, the reasons for this action will be stated on the record. A summary of the evidence introduced in his absence, excluding any reference to confidential sources, will be provided.
- (f) An inmate will be permitted to make his own statement, to call witnesses and to present documents in his behalf, providing the calling of witnesses and/or the disclosure of documentary evidence does not jeopardize the physical safety of staff and inmates. The committee chairman will also call those witnesses he deems necessary and reasonably available and may exclude witnesses whose testimony is irrelevant or cumulative. The chairman will state these reasons for the record. Inmate witnesses may be questioned by the members of the committee and/or the inmate or his representative.

- (g) At the conclusion of the hearing, the committee chairman will provide the inmate with an oral summary of the charges, evidence and testimony which have been presented. Information which would jeopardize the security of the institution will be excluded from this summary. Where information obtained from a confidential, reliable informant is used, the committee will evaluate the reliability of the informant and state on the record their grounds for finding the informant reliable. The reliability of the informant shall be based on: the informant having provided reliable information in the past, the information being offered is based on first hand observations, or there is corroboration either from another source or through physical evidence showing the reliability of the informant's information. No inmate shall be found to have committed the offense solely on the testimony of a confidential informant. A summary of evidence so obtained, excluding identifying information, will also be given orally to the inmate.
- (h) The chairman will provide a written summary of the evidence, including documents, statements, physical evidence which were used as a basis for filing the misconduct report and all the evidence on which the committee based its decision and reasons for the action taken. The decision will be based only on the evidence presented at the hearing. Decisions will be based on a preponderance of the evidence. A copy of this report will be given to the inmate within five days of the committee's decision. The appeal forms will be attached to the written summary provided to the inmate. Inmates will be allowed to obtain assistance in preparation of these forms.

- (i) A hearing may be conducted in the absence of the inmate charged when the inmate refuses to appear and cannot be brought to the hearing without the use of force. In such cases, the refusal must be obtained in the presence of two officers, who will submit written reports attesting to the refusal to the Disciplinary Committee.
- (j) When an inmate escapes from custody, the Disciplinary Committee may conduct a hearing in the inmate's absence. When the inmate is returned to the institution, he may request another hearing before the committee on the escape charge if sanctions such as loss of Good Time were imposed at the initial hearing. Following the rehearing, the committee may dismiss the charges, or modify the disposition, but may *not* increase the sanctions imposed at the initial hearing.

14. *DISCIPLINARY COMMITTEE DISPOSITION:* The committee may take any or a combination of the following actions:

- (a) Dismiss any charge.
- (b) Impose any sanctions appropriate to a minor report, where the committee has reduced the report accordingly.
- (c) Direct that an inmate be placed or be retained in disciplinary segregation unit for a specified period up to the allowable maximum period.
- (d) The Disciplinary Committee may recommend that an inmate be reviewed after his term in disciplinary segregation for classification into maximum security status.
- (e) Recommend to the Classification Committee that a specified amount of Meritorious and/or Statutory Good Time be forfeited.

- (f) Suspend visiting privileges with the visitor involved in the incident when the violation involves these privileges, not to exceed 30 days.
- (g) suspend the allowable punishments.

15. *FINAL APPROVAL OF DISCIPLINARY ACTIONS:* Actions taken by the Disciplinary Committee must be approved by a majority of the committee and forwarded to the superintendent for review. Decisions will be based on a preponderance of the evidence. The chairman of the committee will inform the inmate, at the conclusion of the hearing, that the action is subject to review and revision by the institution superintendent. The inmate will also be informed that the institution superintendent may approve, reduce or modify the decision, reverse the decision and order a new hearing within 72 hours, or three regular working days, from the date of the initial hearing if the warden reasonably determines that the decision was not based on substantial evidence or was based on incomplete information or there is newly discovered exculpatory evidence which was not available to the committee at the time of the hearing. When an inmate is found not guilty, the disciplinary report will be removed from all files on the inmate. All such removed disciplinary reports will be maintained in a separate file for litigative or other non-institutional purposes only, but such reports will not be made available to or utilized by PNM staff or the Parole Board, except at the request of the inmate. All disciplinary reports, regardless of disposition, may be kept and used for statistical or research purposes providing all identification is removed.

16. *APPEALS FROM DISCIPLINARY ACTIONS:* At the time the Disciplinary Committee gives an inmate notice of the decision, the committee will advise the inmate of his right to appeal the decision to the Sec-

retary of the Department of Corrections and Criminal Rehabilitation (hereinafter secretary).¹ The inmate will give signature verification of this advisement, and if he waives the right to appeal, he will sign an appropriate statement to that effect. Within five days the committee will provide the inmate with the written summary, including findings of fact, referred to in 12(h). A copy will also be submitted to the superintendent for his approval at this time.

- (a) Any inmate who feels he has received an unjust decision from the Disciplinary Committee may appeal to the Secretary for final adjudication of the matter.
- (b) The inmate will have 10 working days from the day he receives the written findings to outline, in writing, the basis for the appeal and the names of any witnesses required to substantiate the appeal contention(s). Failure to submit written notice of appeal within the deadline will indicate that no appeal has been requested. Inmates housed in segregation will submit required forms to the casemanager within the 10 day time period, who will refer them to the chairman of the Disciplinary Committee.
- (c) After the inmate has submitted the completed appeal form, the misconduct report, record of disciplinary action and all related statements or documents will then be forwarded to the Corrections Commission Hearing Officer for review within five working days by the institutional superintendent.
- (d) Upon receipt of the appeal materials, the Hearing Officer will determine whether the appeal

¹ The Secretary may delegate to the Corrections Commission the authority to consider inmate appeals. The Secretary retains the final authority, however, to decide inmate appeals.

should be considered on-the-record or de novo. In reviewing the appeal, the Hearing Officer will consider the following factors:

- 1) Compliance with disciplinary policies.
- 2) Was the decision of the Disciplinary Committee based on substantial evidence and facts?
- 3) Was the disciplinary sanction proportionate to the offense?
- 4) New evidence or witnesses.

(e) The burden of proof is on the inmate to prove the contentions stated in his notice of appeal. Appeals based on frivolous contentions (i.e., without a rational claim or basis in fact or policy) will be heard only on-the-record.

(f) If an appeal is to be considered on-the-record, the Hearing Officer will review the record and make a recommendation as to the disposition of the appeal to the Secretary.

(g) If an appeal is to be considered de novo, the Hearing Officer will set a date for the hearing. The witnesses for the inmate, and the institution, will be notified of the date, time and place of the hearing. Witnesses will be provided with notice at least seven days prior to the hearing.

17. *APPEAL HEARING PROCEDURES:* At a de novo hearing, the witnesses for the institution will appear before the Hearing Officer, will be sworn in, and will be responsible for the presentation of all relevant testimony, information, statements, documents and evidence necessary to support the original decision of the Disciplinary Committee. If new or additional information or evidence in the case is acquired after the appeal hearing, the witnesses are responsible for submitting the information to the Hearing Officer. If

witnesses for the institution do not appear at the hearing, the Hearing Officer, at his discretion, may recommend the report be dismissed. At least seven days' notice will be provided to witnesses. After the witnesses for the institution have testified, the inmate will appear before the Hearing Officer. The Hearing Officer will summarize the case and inform the inmate of the evidence presented. The inmate will then be sworn in and present his basis for the appeal, and introduce affidavits or documents and any other information relevant to his case. Inmates will not be represented by attorneys, but inmates may request witnesses from the staff or prison population to appear on their behalf, providing the calling of witnesses and/or the disclosure of the documentary evidence does not jeopardize the physical safety of staff or inmates. Witness testimony of an irrelevant or repetitious nature may be refused by the Hearing Officer at his discretion. Reasons for the exclusion of such witnesses or testimony will be stated on the record. Employee witnesses for the institution will not be interrogated or cross-examined by the appealing inmate and/or in the presence of the appealing inmate. A tape recording will be made of the appeal hearing.

The Hearing Officer will not reinvestigate the case, but may request additional information or documents be submitted by witnesses for the institution or by the witnesses for the inmate within reasonable time limits after the appeal hearing.

The Hearing Officer will inform the inmate of the date that the Corrections Commission is expected to take action on the appeal, and the approximate date that the inmate should expect to be notified of that action. The Hearing Officer will prepare a narrative summary of the case, findings of fact, and conclusions

and recommendations and forward same to the Secretary.

The Hearing Officer's report and recommendation(s) will be presented to the Secretary for review. The Secretary may accept, reject, modify, or refer for further investigation, the recommendations of the Hearing Officer. The Secretary or his designee will notify the appellant in writing of the decision within five (5) regular working days of the decision. The decision of the Secretary is final.

18. *EFFECTIVE DATE.* The provisions of this Policy Statement apply to offenses committed after implementation of the Policy Statement, which implementation date may be determined by court order. The Corrections Department may provide explanatory language to staff and inmates to make the language of this policy statement more readily understandable so long as the explanation is consistent with the language of this policy statement.

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

No. CIV-77-721P

DWIGHT DURAN, LONNIE DURAN, and SHARON TOWERS,
and all others similarly situated,

Plaintiffs,

-vs-

JERRY APODACA, Governor of the State of New Mexico,
CHARLES BECKNELL, Secretary of Criminal Justice,
EDWIN MAHR, Director of Corrections Division, LEVI
ROMERO, Warden of the Penitentiary of New Mexico,
ROBERT MONTOYA and JOSEPH LUJAN,

Defendants.

[Filed July 6, 1978]

FIRST AMENDED COMPLAINT

Plaintiffs state:

PRELIMINARY STATEMENT

1. This amended complaint is a class action brought by Plaintiffs on behalf of all prisoners who are presently, or will be, confined in the Penitentiary of New Mexico (hereinafter referred to as "PNM"). Plaintiffs contend that the totality of the overcrowding and other conditions at PNM fall beneath standards of human decency, inflict needless suffering on prisoners and create an environment which threatens prisoners' mental and physical well-

being, and results in the physical and mental deterioration and debilitation of the persons confined therein which is both unnecessary and penologically unjustifiable.

2. Plaintiffs ask this Court, after hearing the evidence on the allegations in this amended complaint, to declare that the totality of conditions and certain specific conditions presently existing at the PNM are unconstitutional under the Constitutions of the United States and New Mexico and further are in violation of certain statutes of the United States and New Mexico. Consequently, the Plaintiffs ask that the Defendants, and each of them, be permanently enjoined from operating and administering the Penitentiary of New Mexico, or any other facility to which the class members may be assigned, except in compliance with acceptable constitutional and statutory standards as are established by this Court.

JURISDICTION AND VENUE

3. The first claim for relief is filed under 42 U.S.C. sec. 1983 to redress injuries suffered by Plaintiffs and the class they represent for deprivation under color of state law of rights secured by the First, Sixth, Eighth, Ninth, and Fourteenth amendments. Accordingly, this Court has jurisdiction over the first claim pursuant to 28 U.S.C. secs. 1331, 1343(3).

4. Plaintiff's first, second, third and fourth claims for relief are derived from common nuclei of operative facts involving substantially identical issues of fact and law, such that the entire action constitutes a single case which would ordinarily be judicial economy, convenience and fairness, and in order to avoid unnecessary duplication and multiplicity of actions, this Court's jurisdiction over the second, third, and fourth claims, which are based in part upon state law, is pendent to the Court's jurisdiction over the first claim.

5. The fourth claim for relief arises under 49 U.S.C. sec. 3750(b) and the amount in controversy exceeds \$10,000.00. Therefore this Court has jurisdiction pursuant to 28 U.S.C. sec. 1331.

6. Venue is proper in this Court.

PARTIES

7. Each of the named Plaintiffs is presently a prisoner incarcerated in the Penitentiary of New Mexico. Several of them are now or have been confined in segregation facilities at PNM. Others are now or have been incarcerated in protective custody facilities. The named Plaintiffs are:

Dwight Duran, Lonnie Duran, and Sharon Towers.

8. Defendant Jerry Apodaca is the Governor of the State of New Mexico. He appoints the Secretary of Criminal Justice and consents to the appointment of the Director of the Corrections Division. He approves any action by the Secretary to apply for and receive funds. He either sits on the state's Criminal Justice coordinating council or designates a representative to do so.

9. Defendant Charles Becknell is the Secretary of Criminal Justice. It is his duty to manage all operations of the department and to administer and enforce the laws with which he or the department is charged.

10. Defendant Edwin Mahr is the Director of the Corrections Division and his numerous duties are set out N.M.S.A. 42-9-6. (effective March 31, 1978).

11. Defendant Levi Romero is the warden of the PNM and, as such, is responsible for the overall daily operation and management of the PNM.

12. Defendant Robert Montoya is Deputy Warden/Programs of the PNM and, as such, is responsible for the execution of programs in the PNM as well as other management duties.

13. Defendant Joseph Lujan is Deputy Warden/Operations of the PNM and, as such, is responsible for the operation of the PNM and general management duties.

CLASS ACTION ALLEGATIONS

14. This is a class action brought pursuant to Rule 23(a) and 23(b) (1), (2) of the Federal Rules of Civil Procedure. Plaintiffs are representative parties of the class which is composed of all persons presently confined in the PNM or who may be so confined in the future. Plaintiffs are members of the class and their claims are typical of the claims of all class members. Plaintiffs are represented by competent counsel and will fairly and adequately protect the interests of the class. The class is so numerous that joinder of all members is impracticable. The questions of law and fact presented by the Plaintiffs are common to the class. The Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

FACTUAL ALLEGATIONS

15. The totality of the conditions of confinement at PNM violates the constitutional and statutory rights of the Plaintiffs and has caused and is causing persons incarcerated therein irreparable harm.

16. The PNM is presently and has been for some time grossly and inhumanely overcrowded. The main buildings at PNM were built over twenty years ago. Some of the original space allocated for housing has been converted to other uses. On information and belief, the Plaintiffs allege that the present space used for housing prisoners was originally designed to house a capacity of approximately seven hundred prisoners. Although Plaintiffs maintain that the "design capacity" would not meet constitutional standards for living space for prisoners, the PNM presently houses over 1000 prisoners.

17. A portion of the prisoners at PNM live in cells, most of which are approximately 6' by 9' in size. Although cells of that size do not meet any modern recognized standards for space needed for human beings in prison, the problem is exacerbated by having two or more people housed in many of them, with one or more persons having to sleep on the floor, often without a mattress.

18. The majority of the population at PNM are housed in dormitories which are grossly and inhumanely overcrowded with bunks packed together so tightly in many places that there is no space in between them and with many prisoners being forced on occasion to sleep on the floors. The dormitories are filthy and impossible to clean under such conditions. Similarly, security is impossible to provide, thereby endangering the lives of the prisoners confined there.

19. The overcrowding in PNM in and of itself destroys any possibility of privacy for the persons housed there. It also causes tension, anxiety, frustration and emotional and psychological problems. In addition, the overcrowding exacerbates virtually every other constitutionally deficient aspect of PNM which has existed and will continue to exist in spite of the overcrowding.

20. The PNM living quarters are totally unfit for human habitation from the standpoint of health and sanitation. Mice, roaches and other vermin are commonplace. Toilets often do not work properly and are not properly cleaned. The plumbing in the institution and the sewage disposal system pose serious threats to the health of the persons incarcerated there. Inadequate lighting throughout the living areas is physically and mentally harmful to the prisoners. The lack of minimally adequate ventilation is likewise harmful to the inhabitants. Temperatures are often unbearably hot in the summer and cold in the winter.

21. The food service facilities at PNM do not meet minimal public health and sanitation standards. Proper methods are not used in preparing and handling the food served to prisoners. The food served is nutritionally inadequate.

22. Persons incarcerated at PNM are forced to live in constant fear for their lives. Physical attacks upon prisoners are commonplace. Sexual assaults also regularly occur and the refusal to submit to such assaults often results in serious physical injury. The fear of such assaults and injuries is so great that many prisoners have requested to give up what little freedom or access to programs they have in the general population to be locked up and segregated in single-cell "protective custody." This "protective custody" cell block is the most overcrowded area of the PNM with two or more prisoners confined in a cell with an area of fifty four (54) square feet. Prisoners are so confined twenty four hours a day except for two hours per week allotted for exercise or showers. Prison officials have not instituted such programs or practices as will reasonably guarantee the physical safety of prisoners from violent criminal acts against them.

23. The PNM is severely understaffed in professional, educational and security personnel. This understaffing contributes to the inability of the PNM to meet minimal constitutional standards as are described in this complaint. The staff that is available is inadequately trained.

24. The classification of persons incarcerated at PNM so that rehabilitation may take place is required by New Mexico law. Nonetheless, prisoners are not effectively classified according to their educational, vocational or health needs. Most prisoners are assigned based solely upon where space is available. Therefore, many prisoners are housed in more restrictive settings than security considerations require which is contrary to the needs of the corrections system and the prisoners and contributes to

the physical and mental deterioration of many of the prisoners. Even if the prisoners were appropriately classified, there are insufficient programs and opportunities for them at the prison. Many of the problems at PNM, including the high levels of tension, anxiety, idleness and violence, result from, or are contributed to, by the lack of a meaningful or effective classification system.

25. Idleness is the hallmark of the PNM. Most prisoners are not engaged in any regular meaningful industrial or institutional employment, training, or other constructive activity. Neither are there adequate basic, vocational or other educational programs to meet the needs of those incarcerated who desire to participate in meaningful educational training. The forced idleness contributes to a deterioration of whatever work habits and skills the prisoners may have possessed when they entered prison.

26. Recreational opportunities are inadequate. Recreational facilities, equipment, programs and staff are insufficient, thereby increasing idleness, tension and violence at the prison and contributing to the physical and mental deterioration and debilitation of those incarcerated there.

27. Visitation at the PNM is so restricted as to be either non-existent for many prisoners or meaningless to others. The lack of a reasonable visitation policy at PNM contributes to tension, anxiety and frustration, destroys ties with families and friends and contributes to mental deterioration and debilitation without any penological justification.

28. Correspondence policies at PNM are also extremely restrictive, go beyond any legitimate penological rational, and do not further any governmental interest of security, order or rehabilitation. Once again, prisoners' abilities to maintain meaningful contact with the outside world are lessened. Further, the correspondence rules are illegally, arbitrarily and irrationally drawn and are discriminatorily applied.

29. Medical and dental care and treatment is totally inadequate at PNM and constitutes deliberate indifference to prisoners' serious medical needs. Prisoners suffering from emotional and physical disabilities do not receive the special attention and treatment they require. Neither do the mentally retarded or aged and infirm receive adequate care.

30. Access to legal books and resources do not meet constitutional and other legal standards. In addition, law books and other legal materials are grossly insufficient. Attorney-client mail is often illegally inspected and read outside the presence of the prisoner.

31. Defendants MAHR and BECKNELL have refused to allow the implementation of a program designed to provide legal services for prisoners through the utilization of law students under the active supervision of licensed attorneys in violation of Plaintiffs' right of access to the Courts.

32. Fundamental tenents of due process are not followed in disciplinary proceedings at PNM. As a result of disciplinary actions by prison officials, prisoners are frequently placed in segregation cells under conditions which are barbaric and tortuous. They are subjected to shocking overcrowding and filth with no exercise, no fresh air, inadequate heat and light, and are forced to sleep on cold, hard floors under inhumane conditions.

FIRST CLAIM FOR RELIEF

33. Paragraphs 1-32 above are incorporated herein.

34. The totality of the conditions at the PNM violates the rights of persons incarcerated therein under the Eighth and Fourteenth Amendments to the United States Constitution. These conditions also violate the prisoners' rights to freedom of religion, expression and association, access to the Courts, family integrity, privacy, equal protection and due process of law guaranteed by the First,

Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

SECOND CLAIM FOR RELIEF

35. Paragraphs 1-32 above are incorporated herein by reference.

36. The totality of conditions at the PNM which makes rehabilitation by prisoners impossible and causes the unnecessary deterioration of them violates the cruel and unusual punishment clause of the New Mexico Constitution. Article II, sec. 13. These conditions and practices as described also violate the prisoners' rights to freedom of speech, religion, equal protection, due process and other rights guaranteed by Article II, secs. 11, 17, and 18, of the New Mexico Constitution.

THIRD CLAIM FOR RELIEF

37. Paragraphs 1-32 above are incorporated herein by reference.

38. Defendants have failed to exercise their duties to operate the PNM in accord with Article II, sec. 4 of the New Mexico Constitution and N.M.S.A. 42-1-38, 42-1-1.1, 42-1-31.2, 42-9-6(g) and 42-9-6(h).

FOURTH CLAIM FOR RELIEF

39. Paragraphs 1-32 are incorporated herein by reference.

40. Upon information and belief, the Defendants have received funds from the United States Law Enforcement Assistance Administration (LEAA) under 49 U.S.C. sec. 3750(b) for the planning acquisition or construction of correctional facilities. The amount of funds received by Defendants from LEAA exceeds \$10,000.

41. As a condition of the receipt of such federal funds, the Defendants contractually agreed pursuant to 42 U.S.C.

sec. 3750(b) that the programs and facilities of the correctional institutions in New Mexico, including the PNM would reflect advanced practices and standards; that advanced techniques would be used in the design of institutions and facilities; and that necessary arrangements would be provided for the development and operation of narcotic and alcohol treatment programs.

42. Plaintiffs are third party beneficiaries of the contractual arrangements between LEAA and Defendants.

43. The Defendants have failed and refused to carry out their contractual obligations under 42 U.S.C. sec. 3750(b).

PRAAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs request that this Court do as follows:

1. Certify this action as a class action pursuant to Rule 23, F.R.C.P. with the named Plaintiffs representing a class of all persons presently incarcerated in PNM or who may be in the future.

2. Enter a declaratory judgment declaring that the totality of conditions and practices at PNM, as well as certain specific aspects thereof, violate the rights of the Plaintiffs and members of their class under state and federal constitutional and statutory standards as are specified in this complaint.

3. Enter a preliminary injunction pending the final disposition of this case, enjoining Defendants from crowding prisoners into the PNM in excess of the minimum space standards established by the United States Court of Appeals for the Tenth Circuit.

4. Enter a permanent injunction to the Defendants and each of them enjoining them from continuing to incarcerate persons in the PNM or other facilities unless and until the conditions and practices at PNM or other facili-

ties are brought into compliance with constitutional and statutory standards as specified by this Court.

5. Require the Defendants to pay the costs of this action, including a reasonable attorneys' fee for counsel for the Plaintiffs pursuant to 42 U.S.C. sec. 1988.

6. Grant such other and further relief as is proper.

7. At the appropriate time, if the Court desires, Plaintiffs' counsel will submit proposed standards and procedures to assist the Court in fashioning appropriate relief.

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